No. 89-1008-CFX
Status: GRANTED

Title: Dwight H. Owen, Petitioner
v.
Helen Owen

Docketed:
November 29, 1989

Court: United States Court of Appeals
for the Eleventh Circuit

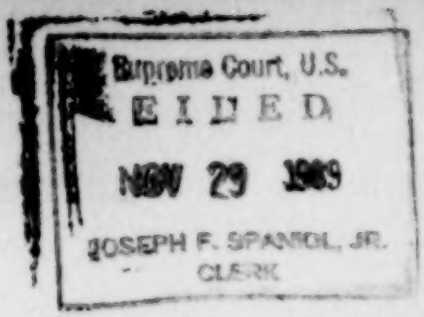
Counsel for petitioner: Kirshenbaum,Isidore

Counsel for respondent: Dyk,Timothy B.

40 pets rec'd 11/29/89-1 ret 40 corr'd rec'd 12/21/89

Entry	Date	Note	Proceedings and Orders
1	Nov 29 1989	G	Petition for writ of certiorari filed.
3	Jan 19 1990		Waiver of right of respondent Owen to respond filed.
2	Jan 24 1990		DISTRIBUTED. February 16, 1990
4	Feb 13 1990	F	Response requested -- BRW.
5	Mar 13 1990		Order extending time to file response to petition until April 16, 1990.
6	Apr 13 1990		Brief of respondent Owen in opposition filed.
7	Apr 18 1990		REDISTRIBUTED. May 10, 1990
8	May 14 1990		Petition GRANTED.
			**********
9	Jun 21 1990		Joint appendix filed.
10	Jun 21 1990		Brief of petitioner Owen filed.
12	Jul 26 1990		Order extending time to file brief of respondent on the merits until August 10, 1990.
13	Aug 10 1990		Brief of respondent Owen filed.
14	Aug 28 1990		CIRCULATED.
15	Sep 10 1990	X	Reply brief of petitioner Dwight Owen filed.
16	Sep 26 1990		SET FOR ARGUMENT MONDAY, NOVEMBER 5, 1990. (4TH CASE)
17	Oct 31 1990		Record filed.
			Certified copy of original record, 3 volumes, received.
18	Nov 5 1990		ARGUED.

89-1008



IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

DWIGHT H. OWEN
Petitioner

vs

HELEN OWEN
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ISIDORE KIRSHENBAUM
1900 Main Street
Sarasota, Florida

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly interpreted and applied 11 USC 522(f)(1) in denying lien avoidance, with respect to otherwise exempt property, based upon Florida law which provides that certain judgment or judicial liens create exceptions to the exemptions.

2. Whether a state law provision that creates exceptions to state homestead exemption for certain judgment liens based upon the time that the lien attaches is a premissible exemption provision for a state which has "opted out" of the federal exemptions when such "exception" is a judicial lien within the application of 11 USC 522(f)(1).

STATEMENT PURSUANT TO RULE 28.1

Dwight H. Owen is an individual petitioner

Helen Owen is an individual respondent

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TABLE OF AUTHORITIES

Cases

OPINIONS BELOW

The July 11, 1989 opinion of the 11th Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 877 F.2d 44 (11th Cir. 1989) and is reprinted in the Appendix to this petition at A1. The prior opinion of the United States District Court, Middle District of Florida, entered on June 7, 1988, is reported at 86 B.R. 691 (DC MD Fla 1988), and is reprinted in the Appendix at A13. The prior opinion of the United States Bankruptcy Court, Middle District of Florida, entered on February 8, 1988, was unreported and is reprinted in the Appendix at A24.

JURISDICTION

The decision of the 11th Circuit Court of Appeals was entered on the 11th day of July 1989 and affirmed the decision of the United States District Court, Middle District of Florida. (A1) A timely filed Petition for Rehearing and Suggestion for Rehearing In Banc were denied on the 31st day of August 1989. (A28) This Court has jurisdiction pursuant to 28 USC 1254(1).

STATUTES INVOLVED

Title 11, United States Code §§ 522(b), 522(f), reproduced at (A33-35).

Section 222.20, Florida Statutes, reproduced at (A39).

STATEMENT OF THE CASE

1. INTRODUCTION

The Petitioner, the debtor in a Chapter 7 bankruptcy case, sought to avoid Respondent's judgment or judicial lien, pursuant to 11 USC 522(f)(1), upon the debtor's homestead real property which was claimed and allowed as exempt in the bankruptcy proceedings. The courts below held the lien to be unavoidable because the law in Florida, which has "opted out" of the federal exemptions, permits enforcement of this lien. Under state law, the attachment of Respondent's judgment as a lien created an "exception" to the otherwise available exemption.

Petitioner contends that the plain language of 11 USC 522(f) permits avoidance and that the state created "exception" under 11 USC 522(b) remains subject

to the provisions of 11 USC 522(f). The Petitioner also contends that to permit state law definitions of "exceptions" to include judgment or "judicial" liens (to which 11 USC 522(f) should apply), would authorize state law nullification, or "opting out", of the federal lien avoidance provision, a result not consistent with proper statutory interpretation.

II. THE FACTS

There is no dispute as to the facts. The Respondent obtained a money judgment against the Petitioner in circuit court, Manatee County, Florida in December 1975. A certified copy of that judgment was recorded in the public records of Sarasota County, Florida on 29 July 1976. At that time Petitioner owned no property in Sarasota County.

On 27 November 1984, Petitioner acquired record fee ownership of the real

property at issue herein, Unit 304 of Embassy House, a condominium, located in Sarasota County. At that time, Petitioner was a single man and not "the head of a family" as was then required for entitlement to the Florida Constitutional homestead exemption. Article 10, Section 4, Fla. Const.

On 6 November 1984 the citizens of Florida approved an amendment to the constitutional homestead provision which substituted "a natural person" for the previously required "head of a family".

That amendment became effective on 8 January 1985. Article 11, Section 5(c), Fla. Const.

Under Florida law, no judgment is a lien upon any property until property is owned by the judgment debtor. First National Bank of Chipley v. Peel, 145 So. 177 (Fla. 1933), Bowers v. Mozingo, 399 So. 2d 492 (Fla. 3d DCA 1981). A duly

recorded judgment against a debtor becomes a lien upon that debtor's real property at the time the debtor acquires ownership of real property in the county in which that judgment is recorded. B.A. Lott, Inc. v. Padgett, 14 So. 2d 667 (Fla. 1943). Thus, the Respondent's judgment attached as a lien at the time the above property was acquired by Petitioner on 27 November 1984. In addition, a judgment which attaches as a lien upon the debtor's property at a time when the debtor is not eligible to claim the homestead exemption will remain enforceable despite the fact that the debtor later qualifies for the exemption. Aetna Insurance Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969). Although the attachment of such a lien does not prevent subsequent acquisition of the homestead right, see Lamb v. Ralston Purina Co., 21 So. 2d 127 (Fla. 1945), such a lien will remain enforceable

even as to homestead property. See Porter-Mallard Co. v. Dugger, 157 So. 429 (Fla. 1934). As a result, under state law the Respondent's lien is enforceable despite acquisition of the right to assert the exemption.

On 13 January 1986, the Petitioner filed his Chapter 7 bankruptcy petition and claimed the above property as exempt as his homestead on his B-4 schedule, in accordance with Chapter 222.20, Florida Statutes (A39), the provision which limits Florida debtors to state, rather than federal, exemptions in bankruptcy. The bankruptcy court allowed this exemption for purposes of general administration of the estate. The exemption was allowed because the relevant date for determining exemption entitlements is measured by the exemption provisions in effect on the date of the filing of the petition. 11 USC 541, In Re Zahn, 605 F. 2d 323 (7th

Cir. 1979) cert den 444 US 1075, 100 S Ct 1072, 62 L Ed 2d 757 (1980), Lewis v. Manufacturer's National Bank, 364 US 603, 81 S Ct 347, 5 L Ed 2d 323 (1961).

In due course the Petitioner received his bankruptcy discharge. Thereafter, the court permitted the case to be re-opened, at Petitioner's request, for the purpose of filing a motion to avoid Respondent's lien pursuant to 11 USC 522(f). The order of 8 February 1988 (A24) in which the bankruptcy court held the lien to be unavoidable is the order appealed to the District Court and Court of Appeals. The District Court (A13) and Court of Appeals (A1) both affirmed the bankruptcy court.

III. ARGUMENT

In denying lien avoidance, the opinions below have focused primarily upon the survivability of the lien provided by state law. The opinions have failed to independently apply the plain language

of 522(f). The bankruptcy court opinion at (A26), quoted by the Court of Appeals at (A 5), recites only the rule of survivability under state law. Furthermore, in concluding that "a judicial lien" could be construed as the characteristic which creates an "exception" to the exemption, the Court of Appeals not only failed to observe prior 11th Circuit precedent, see In Re Hall, 752 F. 2d 582 (11th Cir. 1985), but set forth a prescription for nullification of the "judicial lien as an impairment" concept so clearly set forth in 522(f)(1).

In other words, Congress specifically allowed states to devise their own lists of types and quantities of property which could be exempted in bankruptcy. This is the "opt out" provision found in 522(b). No similar option is accorded to the states under 522(f), however. The lien avoidance provision under 522(f) applies to both

state and federal exemptions alike. Each section serves distinct purposes and well settled principals of statutory construction requires that those sections be construed in such a way as give effect to each. 522(b) is designed to identify exemptions. 522(f) is designed to permit removal of certain obstacles to the enjoyment or assertion of those exemptions. A characteristic which is identified under 522(f) as an obstacle to the enjoyment or assertion of an exemption can not at the same time be designated, by state law, as an "exception" to the exemption described in 522(b). Such a definition under 522(b) would, all too obviously, nullify or defeat the use and purpose of 522(f). Not only is such a result inconsistent with proper statutory construction, but it can not be assumed that Congress intended that exemptions under 522(b) could be defined in such a way, under the "opt out"

provision, that 522(f) would be rendered functionless. The precise situation outlined above is presented in Owen and the decision of the Court of Appeals fails to properly resolve it. See the opinion of the Court of Appeals at (A 8-9).

Here, the Petitioner meets the requirements for lien avoidance, i.e. 1) the lien is a judicial lien within the code definition of that term, 2) the lien has attached to his property and is enforceable against it unless avoided, hence impairment, 3) the property qualified as his homestead on the date of the filing of the Chapter 7 petition and therefore is an exemption to which the debtor "would have been entitled."

REASONS FOR GRANTING THE WRIT

The essential question presented in this case concerns the relationship between two significant code provisions, i.e. 11 USC 522(b) and 11 USC 522(f). The proper application of the federal lien avoidance provision, 522(f), to state exemption schemes enacted pursuant to the "opt out" provision of 522(b) is an issue which has produced conflicting decisions among the circuits, conflicting decisions within the 11th Circuit and uncertainty as to the scope of state authority under the Code.

CONFLICT AMONG THE CIRCUITS

1. The following cases have indicated that 522(f) must be applied in states which have enacted their own exemptions. The 2d, 4th, 8th, 10th and 11th circuits indicate that it is federal, rather than

state, law which governs lien avoidance. In Re Brown, 734 F.2d 119 (2d Cir. 1984) authorized avoidance of a judicial lien where, in the absence of the lien, the exemption could be enjoyed. Dominion Bank of the Cumberlands, NA v Nuckolls, 780 F.2d 408 (4th Cir. 1985) authorized avoidance of a lien pursuant to 522(f) notwithstanding its enforceability under state law. In Re Thompson, 750 F.2d 628 (8th Cir. 1984) noted that, although state law may control exemptions, federal law determined lien avoidance availability, and that exemption statutes and lien avoidance provision served different purposes. In Re Leonard, 866 F.2d 335 (10th Cir. 1989) cited the rule that states may not "opt out" of lien avoidance provision, noting, at pg 336-337,

> "...The debtor's right to claim avoidance of a lien on property under 522(f) is determined by

> considering whether the property, if unencumbered, is exempted under the state statutory exemptions..."

and concluding that avoidance was appropriate where state law allowed such property to be exempted if unencumbered.

In Re Hall, 752 F.2d 582 (11th Cir. 1985) the Court, in reviewing a Georgia statute which permitted a debtor to exempt property only if it was not encumbered by a lien, stated

> "This Section 522(f) operates to permit a debtor to avoid the fixing of a lien on property if that avoidance would allow the debtor to enjoy the exemption. The very purpose of the statute is to permit debtors to claim, or exempt, property completely or partially secured by an otherwise valid lien. To permit states to inhibit the lien avoidance provision by simply defining all lien encumbered property as 'not exempt' would render the statute useless, a result inconsistent with the well established principal of statutory construction requiring that all parts of an act be given effect if at all possible"

The lien avoidance provision was intended to apply to state exemptions, notwithstanding state limitations on the ability

of the debtor to exempt lien encumbered property. Hall, above, at pg 587

The foregoing cases indicate that states may not opt out of lien avoidance even though they have chosen state exemptions. The Court of Appeals in Owen has, however, effectively permitted Florida to "opt out" of lien avoidance by approving a state law "exception" for property subject to an otherwise avoidable lien.

2. The following cases have approved state law limitations on lien avoidance under 522(f). The 5th and 6th circuits permit state definitions of exemptions which renders lien avoidance unavailable. In Re Pine, 717 F.2d 281 (6th Cir. 1983) cert den 466 US 928, 104 S Ct 1711, 80 L Ed 2d 183 (1984), concluded that the authority given states under 522(b) to select exemptions included the authority to exclude encumbered property from those exemptions. In Re McManus, 681 F. 2d 353,

(5th Cir. 1982) similarly concluded that state definitions of exceptions could preclude lien avoidance. Because Louisiana law had defined otherwise exempt property as non-exempt if encumbered by a lien no impairment existed, hence lien avoidance was not applicable.

This state defined "exception" to exemption for lien encumbered property is the basis for denying lien avoidance in Owen as well.

CONFLICT WITHIN THE 11TH CIRCUIT

From the foregoing it appears that the Owen decision can not be reconciled with 11th circuit precedent as stated in In Re Hall, above, and that Owen is most closely aligned with the 5th and 6th circuits. In Hall and in In Re Maddox, 713 F. 2d 1526 (11th Cir. 1983), the 11th circuit clearly adopted the view that states may not "opt out" of lien avoidance and that 522(f) must be applied independently

of the state exemptions. In Owen, however, this position was abandoned for the 5th and 6th circuit propositions that 522(f) could be limited or precluded by state definitions created under 522(b). In short, "impairments" under 522(f) could be reclassified as "exceptions" under 522(b). Although not express, the conflict is, nevertheless, unmistakeable.

STATUTORY INTERPRETATION

Because 522(f) is a federal provision which contains no state option some courts have interpreted the Pine and McManus reasoning as being an impairment or frustration of the federal purpose and therefore contrary to the requirements of the Supremacy Clause. See In Re Pelter, 64 B.R.492 (Bankr WD Okla 1986), In Re Hershey, 50 B.R.329 (DC SD Fla 1985), In Re Taylor, 73 B.R. 149 (9th Cir BAP 1987, see also Judge Dyer's dissent in McManus, 681 F.2d 353, 358 (any conflict

between the state lien conservation provision and the federal lien avoidance provision must be constitutionally resolved in favor of federal law).

It is clear that 522(f) would have no function if the McManus view with respect to state definitions were correct. Such an intent should not be attributed to the Congress. If, indeed, states were to have the power which McManus suggests, it is for the Congress to so provide.

The plain language of 522(f) does indicate that a lien is avoidable where the lien impairs an exemption "to which the debtor would have been entitled." This denotes a condition contrary to fact, a point which is further indicated by the following

> "Subsection (f) protects the debtor's exemptions, his discharge and thus his fresh start by permiting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property

> could have been exempted in the absence of the lien...The avoidance power is independent of any waiver of exemptions. H.Rep. No. 95-595,95th Cong. 1st Sess. (1977) 362; S.Rep No. 95-989, 95th Cong. 1st Sess. (1978)76 (under Sub-section e); U.S. Code Cong. & Admin. News 1978, pp. 5787, 6318.

The plain language of the code also does not contain any "time of attachment" element under 522(f), although there is an indication in the Owen bankruptcy court opinion that such was a consideration. "Time of attachment" of the lien is not relevant under 522(f). The cases of In Re Hershey, 50 B.R. 329 (DC SD Fla 1985) and In Re Baxter, 19 B.R. 674 (9th Cir BAP 1982) both authorized lien avoidance even though, as in Owen, the lien attached prior to the availability of the exemption.

SUMMARY

Each of the foregoing reasons is sufficient justification for granting the writ. It has been the policy of the state of

Florida to afford liberal construction to the homestead exemption. Quigley v. Kennedy & Ely Insurance, Inc., 207 so. 2d 431 (Fla. 1968). It is also the policy of the Code to assure the debtor a fresh start. Neither interest is served by the construction placed upon the statutory provision in this case. Furthermore, the construction of the code provisions authorized in Owen, which amounts to a recipe for the defeat of federal lien avoidance at the hands of state law, is improper interpretation of the federal statute. It is for Congress to set forth the limitations authorized by Owen and the 5th and 6th circuit cases, yet the Congress has not seen fit to do so.

If the lien in Owen is not avoided the Petitioner's home will be lost, the very property which the state and federal provisions were designed to protect. The exemption, which is of constitutional

origin and magnitude will be defeated by the judgment lien, a mere creature of statute which by its very nature operates indiscriminately upon property and constitutes no estate in the property for the lienholder. See Gilpen v Bower, 12 So. 2d 884 (Fla. 1943).

The lack of uniformity in the application of the lien avoidance provision in states using their own exemptions is continued in Owen, yet requires resolution by this Court. Until resolved by this Court, the divergence of interpretation outlined above will persist and, in some circuits, frustration of Congressional intent will continue.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the foregoing reasons. In the alternative, the Petitioner requests the Court to grant summary reversal pursuant to Rule 23.1 of the Rules of the Supreme Court.

Respectfully submitted,

Isidore Kirshenbaum
1900 Main Street, Suite 214
Sarasota, Florida 34236
(813) 351-2883
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of this Petition have been furnished to John R. Shuman, Esq., 2555 Enterprise Rd., Clearwater, Florida 34623, Attorney for Respondent, Helen Owen, by prepaid first class mail this 19th day of December, 1989.

Isidore Kirshenbaum, P.A.

By _____

1900 Main St., Suite 214
Sarasota, FL 34236
(813) 351-2883
Attorney for Petitioner

APPENDIX

In Re Dwight H. OWEN, Debtor

Dwight H. OWEN, Plaintiff-Appellant

v

Helen OWEN, Defendant-Appellee

No 88-3499

United States Court of Appeals

Eleventh Circuit

July 11, 1989

Appeal from the United States District Court for the Middle District of Florida

Before POWELL*, Associate Justice (Retired), United States Supreme Court, RONEY, Chief Judge, and TJOFLAT, Circuit Judge.

RONEY, Chief Judge:

In this case, both the bankruptcy court

*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, Retired, sitting by designation.

and the district court concluded that 11 U.S.C.A. § 522(f) of the Bankruptcy Code did not permit a debtor to avoid a judicial lien on Florida homestead property when state law creating the homestead exemption would permit the lien to be enforced. We affirm.

The facts are not in dispute. The dates are important to show that the lien was effective prior to the date the debtor obtained homestead status for the property. Creditor Helen Owen obtained a final judgment against the debtor Dwight Owen in Manatee County Circuit Court on December 1, 1975, and a certified copy was recorded in the Sarasota County Public Records on July 29, 1976. Such a recorded judgment becomes a lien upon real property thereafter acquired by the judgment debtor, unless the property was exempt from all judgment liens. B.A. Lott, Inc. v. Padgett, 153 Fla. 304, 14 So. 2d 667 (1943); Porter-

Mallard Co. v. Dugger, 117 Fla. 137, 157 So. 429 (Fla. 1934).

In November 1984, the debtor bought a condominium unit in Sarasota County. At the time of the purchase, the debtor was not entitled to a homestead exemption from judgment liens under Article 10, Section 4 of Florida's constitution, because the section then allowed the exemption only to the "head of a family". An amendment to this section, allowing the exemption for "a natural person" did not become effective until January 8, 1985. Thus, at the time of the purchase, the judgment lien attached to the property.

The debtor filed a Chapter 7 bankruptcy petition in January 1986 and claimed the condominium as Florida homestead property, exempt from administration by the bankruptcy court. Under Florida law, constitutional homestead property is exempt from the claims of creditors not secured by a lien on the

property. See Fla. Stat. §222.20; Fla. Const. Art 10, §4. The bankruptcy court, in an August 13, 1986 order, allowed the property to be exempt from general administration by the trustee, but specifically did not decide whether Helen Owen's judgment lien against the property would be enforceable.

The debtor was discharged on May 13, 1986. In April 1987, however, the debtor was given permission to reopen the bankruptcy case pursuant to 11 U.S.C.A. § 350. He then moved, according to Rule 4003(d), to seek an avoidance of Helen Owen's judgment lien, under 11 U.S.C.A. § 522(f)[1].

After hearing argument, the bankruptcy court on December 1, 1987, granted the

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1. Section 522(f) provides in relevant part: Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --
(1) a judicial lien...

debtor's motion to avoid the lien. Thereafter, however, Helen Owen filed a timely motion to amend or make additional findings of fact and to alter or amend this order. On February 8, 1987, the bankruptcy court reversed its December 1 ruling, finding for the judgment lienholder, stating;

> Clearly, if at the time the certified copy of the judgment was recorded in the Public Records, the Debtor owned the property but for whatever reason did not qualify to claim the property as homestead, such judgment lien would be clearly non-avoidable under 522(f) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of 522(f)(1) and may not be avoided.

The district court upheld the bankruptcy court's determination that Helen Owen's lien, which substantially predated the acquisition of the property and the filing of the bankruptcy petition, was not avoidable under section 522(f). 86 B.R. 691 (M.D. Fla. 1988).

When a bankruptcy petition is filed, all of the debtor's property becomes the property of the bankruptcy estate. 11 U.S.C.A. § 541(a). After the property comes into the estate, the debtor may claim certain items as exempt from the bankruptcy estate[2]. The federal statute provides a "laundry list" of property available for exemption, unless a state "opts out" of this list and allows its residents to take advantage only of the state-created exemptions.

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2. 11 U.S.C.A. §522(b) provides in relevant part: Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either--

(1) property that is specified under subsection (d) of this section, [the federal list], unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place...

Florida has chosen to opt out of the bulk of the federal laundry list[3]. Accordingly, Florida state law governs the question of whether property may be exempted from the bankruptcy estate.

The claimed exemption here is created by Florida's constitutional homestead provision. Article 10, § 4 of the Florida Constitution states in part that homestead property is not subject to foreclosure of a judgment lien[4].

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3. See Fla. Stat. § 222.20 (opt out); section 220.201 (allowing exemption described in subsection (d)(10) relating to debtor's rights to receive benefits such as social security and unemployment compensation). Section 222.20 further provides that "[n]othing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes."

4. (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field, or other labor performed on the realty, the following property owned by a natural person:
(1) a homestead,...if located within a municipality, to the extent of one-half acre (cont,)

Section 522(f) allows the debtor to avoid certain liens in order to protect against impairment of an exemption to which he would otherwise be entitled. There is no impairment of an exemption here, however. Under state law, the homestead exemption precludes attachment of a judgment lien except where the lien came into existence prior to the property attaining homestead status. Fla. Const. Art. 10, §4; see Bessemer v. Gersten, 381 So. 2d 1344 (Fla. 1980); Aetna Ins. Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969); Volpitta v. Fields, 369 So. 2d 367 (Fla. 4th DCA), cert denied, 379 So. 2d 204 (Fla. 1979); In Re Valdes, 81 B.R. 141 (Bankr. S.D. Fla. 1987). Where, as here, the judgment attached prior to

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4. (cont.) of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.

the homestead right, there is no impairment because the exemption is specifically subject to this exception.

The debtor here does not dispute that Helen Owen's lien on his property would be enforceable under Florida law because it attached to the property before the debtor was able to avail himself of the homestead right. He argues, though, that section 522 (f) allows him to avoid the lien because he now qualifies for the homestead exemption and if the lien did not exist, he could claim the exemption. In effect, he argues that federal law gives him an exemption that state law would not, even though the exemptions in Florida are defined by state law because of its "opting out" of the federal exemptions.

Congress did not intend through section 522(f), however, to provide a federal exemption greater than that protected by state law where the exemption is created by state

law. The legislative history of section 522(f) indicates that Congress sought to protect debtors from the race to judgment often occurring just prior to a debtor filing bankruptcy. That is, when it appears that a debtor is having trouble meeting his obligations, creditors rush to reduce their interests to judgment, attaching all of the debtor's property, including that which would otherwise be exempt. Thus, when the debtor files, he has no unencumbered property left with which to "make his fresh start." Accordingly, section 522(f) was adopted to

> ...give[] the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property, and any non-purchase money security interest in certain exempt property such as household goods. The first right allows the

> debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions....

H.R.Rep.No. 595, 95th Cong., 1st Sess., reprinted in U.S.Code Cong. & Ad. News 5787, 6087 (1978). This is not the case here. The debtor never held this property exempt from this judicial lien.

We also hold that the bankruptcy judge acted within his authority under the local rules to issue the February order without affording a hearing to the debtor. Rule 101(c) of the local bankruptcy rules allows the judge to suspend the reguirements of the rules in order for the case to proceed at the court's direction. Further, the court had before it the entire

record and, under the rules, need only afford notice and a hearing as is "appropriate in the particular circumstances." Here, it was appropriate to rule based on the papers filed by the parties.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

IN RE:

DWIGHT H. OWEN

Debtor

_____/

DWIGHT H. OWEN

Appellant

vs Appellate Case No.

HELEN OWEN 88-404-CIV-T-17

Appellee

_____/

APPEAL

FROM THE UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORDER ON APPEAL

This cause is before the Court on appeal from the Order on Motion to Amend or Make Additional Findings entered February 8, 1988, by Bankruptcy Judge Alex-

ander L. Paskay, and request for oral argument. The request for oral argument is denied.

ISSUES:

I. Whether or not the trial court correctly ruled that a debtor could not invalidate a judicial lien, pursuant to s522(f)(1) of the Bankruptcy Code, which preceded debtor's homestead exemption under Florida law and arose prior to debtor's acquisition of the subject property.

II. Whether or not the trial court correctly entered an order on motion to amend or make additional findings of fact pursuant to bankruptcy rule 7052(b) and to alter or amend the order on motion to avoid judgment lien pursuant to bankruptcy rule 9023, without notice and a hearing.

STANDARD OF APPELLATE REVIEW

The applicable standard of appellate review is that findings of fact shall not be set aside unless clearly erroneous.

Griffin v Missouri Pacific Railway Co., 413 F.2d 9 (5th Cir.1969); Bankruptcy Rule 8013. Appellant is entitled to an independent de novo review of all conclusions of law and the legal significance accorded to the facts.

FACTS

Helen Owen obtained a final money judgment against the debtor on December 1, 1975, in Manatee County Circuit Court. The certified judgment was recorded in Sarasota County, Florida, on July 29, 1976, O. R. 1127, Page 1494. At that time Appellant did not own property in Sarasota County. On November 27, 1984, debtor acquired a fee simple ownership of the real property known as Unit No. 304, Embassy House. The deed for the property was recorded in the public records of Sarasota County, on November 27, 1984, O. R. 1732, Page 676.

At that time the debtor was a single

man and not the "head of a family", within the meaning of Article 10, Section 4, Florida Constitution, relating to the homestead exemption. On November 6, 1984, the homestead provision was amended substituting "a natural person" for "a head of a family". The amendment became effective January 8, 1985.

Appellant, a single man, filed a Chapter 7 bankruptcy petition on or about January 13, 1986. The petitioner claimed real property known as Unit 304, Embassy House, located in Sarasota County, Florida, as exempt property in the B-4 of the Florida Constitution and Chapter 222.20, Florida Statutes, exempting homestead property.

A creditor, Helen Owen, filed an objection to the exemption claim on January 22, 1986. On August 13, 1986, the bankruptcy judge overruled the objection and designated the property exempt and immune

from the general administration of the Trustee. The debtor did not resolve the issues of post-petition lien status or debtor's rights as to avoidability or enforceability of Helen Owen's lien.

Appellant was granted discharge on May 13, 1986. On December 15, 1986, the debtor filed an application to re-open the case for the purpose of seeking to avoid the lien of Helen Owen, pursuant to 11 USC 522(f)(1). The case was reopened by the bankruptcy court. On April 13, 1987, the debtor filed a motion to avoid the lien and Helen Owen filed a response. Argument was had before the court on August 21, 1987.

On December 1, 1987, the bankruptcy court entered an order granting the motion to avoid the lien. Thereafter, Helen Owen filed a motion to amend or make additional findings of fact, pursuant to Rule 7052(b), and to alter or amend the order of Decem-

ber 1, 1987. On February 8, 1988, the court entered an order reversing the December 1 ruling. The order found the lien sought to be avoided was not of the type included in Section 522(f)(1) and denied debtor's motion to avoid the lien. This is the order appealed from by Appellant.

DISCUSSION

The Court will address the procedural validity of the bankruptcy court's entry of order on motion to amend, filed February 8, 1988. The order states that the cause was before the court on ex parte consideration of Helen Owen's motion to amend. The court considered the motion to amend and the prior record in the cause. The court did not require or allow a response from debtor to the motion to amend, nor was argument or hearing allowed on the motion.

Upon due consideration, the Court finds the brief of Appellee on this issue

persuasive. The local rules of the bankruptcy court imbues the bankruptcy judge with the power to suspend the requirements of the rules and for proceedings in accordance with the court's direction. Rule 101, Local Rules of the Bankruptcy Court. The Court specifically finds the order of February 8, 1988, to have been entered within the authority of Judge Paskay.

The second issue is whether or not the bankruptcy court was in error in amending its previous order and finding that the lien of Helen Owen on the property in question was not avoidable. Appellant seeks to avoid the lien of Helen Owen under 11 USC s522(f), which states in relevant part:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --
> (1) a judicial lien;

The judgment of Helen Owen, recorded in the public records on July 29, 1976, attached as a lien, instantly, upon the acquisition of title by the debtor on 27 November 1984. (Appellant brief, pg. 10). A previously attached judgment lien will prevail over an after acquired right of homestead. Pasco v Harley, 75 So. 30 (Fla. 1917); Aetna Insurance Co. v LaGrasse, 223 So. 2d 727 (Fla. 1967); Bessemer v Gersten, 381 So. 2d 1344 (Fla. 1980). Debtor was not entitled to the homestead exemption on the purchase of the real property; the amendment allowing the exemption did not become effective until January 8, 1985. Under state law, the lien would remain enforceable against this homestead property. (Appellant's brief, pg. 11).

The bankruptcy discharge has no effect on the lien. A judgment attaching to property and becoming a lien prior to bankruptcy survives the discharge and remains

enforceable, to the extent of the state law. Barnett Bank v Harris, 421 So. 2d 822 (Fla. 1st DCA 1982); Albritton v General Portland Cement, 344 So. 2d 574 (Fla. 1977). Appellant contends however that 11 USC s522(f), if affirmative action is taken by a debtor to invoke the provisions of that section, renders the lien herein unenforceable.

Section 522(f) provides for the avoidance of security interests on certain exempt items, to the extent the lien impairs an exemption to which the debtor is entitled. Even though Florida has "opted out" of the exemptions provided in 11 USC s522(d), the provisions of s522(f) are applicable to Florida bankruptcy proceedings. In Re Hershey, 50 B.R. 329 (DC SD Fla. 1985). The question before the court is whether the application of s522(f) allows the debtor to avoid the lien of Helen Owen.

Appellee urges the Court to adopt a position that the lien which substantially

pre-dated both the filing of the bankruptcy petition and the debtor's obtaining of homestead rights is not an avoidable lien within the meaning of s522(f). Appellee cites a line of cases for the proposition that "... a judicial lien which attached to an interest in property prior to the debtor's acquisition of that interest is not avoidable pursuant to s522(f)(1)" inasmuch as "the phrase 'an interest of the debtor in property' refers to an unencumbered interest at the time of acquisition." McCormick v Mid-State Bank and Trust Co. 33 B.R. 997 (WD Pa. 1982); In Re: Williams, 38 B.R. 224 (ND Okla. 1984); In Re: Sprick, 78 B.R. 292 (D Kan. 1987).

The Court finds this line of cases persuasive and adopts their reasoning. The Court additionally finds persuasive the arguments of Appellee that debtor never owned an unencumbered interest in the real property in question, since the lien attached

to the property simultaneously with acquisition of the property.

This Court, having carefully considered the two issues on appeal, concludes that the bankruptcy court did not err in determining that the judgment lien of Helen Owen was not avoidable pursuant to 11 USC s522(f) or erroneously deny debtor a hearing on the motion to amend. Accordingly, it is

ORDERED that the order on motion to amend or make additional findings and to alter or amend order on motion to avoid judgment lien, filed February 8, 1988, be affirmed. The Clerk of the Court is directed to enter judgment in accordance with this Order.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 7th day of June, 1988.

/s/Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties
and counsel
of record

UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In Re:

DWIGHT H. OWEN

Debtor Case No 86-106-8P7

ORDER ON MOTION TO AMEND OR MAKE ADDITIONAL FINDINGS OF FACT PURSUANT TO RULE 7052(b) AND TO ALTER OR AMEND THE ORDER ON MOTION TO AVOID JDUGMENT LIEN PURSUANT TO RULE 9023

THIS cause came on for consideration ex parte, upon a Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023 filed by Helen Owen, a creditor in the above captioned Chapter 7 case. The Court has considered the mo-

tion, together with the record, and is satisfied that the Motion is well taken and should be granted. Accordingly, the Order on Motion to Avoid Judgment Lien entered by this Court on December 1, 1987 should be amended as follows:

The Motion to Avoid Judgment Lien was filed by Dwight H. Owen, the Debtor in this Chapter 7 case. The Motion seeks to avoid a judgment lien in favor of Helen Owen. The judgment was obtained on December 1, 1975 and a certified copy was recorded in the Sarasota County Public Records on July 29, 1976.

In November 1984, the Debtor purchased certain real property in Sarasota County, and at this time the judgment of Helen Owen attached to the property.

At the time the Debtor acquired the property and the judgment lien attached, the Debtor was not entitled to claim the property as homestead due to the fact that

he was not a "head of household" as was required under Article X, Section 4 of the Florida Constitution prior to its Amendment. It was not until January 1985, which was the effective date of the Amendment to Article X, Section 4 of the Florida Constitution, which substituted the term "natural person" for the previous term "head of household", that the Debtor was entitled to claim the property as homestead.

Clearly, if at the time the certified copy of the Judgment was recorded in the Public Records, the Debtor owned the property but for whatever reason did not qualify to claim the property as homestead, such judgment lien would be clearly non-avoidable under §522(f)(1) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of §522(f)(1) and may not be avoided.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023 be, and the same is hereby, granted. It is further

ORDERED, ADJUDGED AND DECREED that the Order on Motion to Avoid Judgment Lien entered on December 1, 1987 be, and the same is hereby, amended to reflect the changes as set forth in this Order. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor's Motion to Avoid Judgment Lien be, and the same is hereby, denied.

DONE AND ORDERED at Tampa, Florida on February 8, 1988.

/s/Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge

cc:
John R. Shuman for lienholder
Roger L. Fishell, Attorney for Debtor
Dwight H. Owen, Debtor

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No, 88-3499

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff-Appellant

v.

HELEN OWEN

Defendant-Appellee

Appeal

From the United States District Court

for the Middle District of Florida

ON PETITIONS FOR REHEARING

AND SUGGESTIONS FOR REHEARING IN BANC

(Opinion July 11, 1989, 11 Cir., 1989,

_____ F. 2d _____).

(August 31, 1989)

Before POWELL*, Associate Justice (Retired),

United States Supreme Court, RONEY, Chief

Judge, and TJOFLAT, Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions for Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney

United States Circuit Judge

*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, Retired, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3499

D.C. Docket No. 88-00404

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff-Appellant

v.

HELEN M. OWEN

Defendant-Appellee

APPEAL

From the United States District Court

for the Middle District of Florida

Before POWELL*, Associate Justice (Retired), United States Supreme Court, RONEY, Chief Judge, and TJOFLAT, Circuit Judge.

JUDGMENT

This cause came on to be heard on the

transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED:

IT IS FURTHER ORDERED that plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, retired, sitting by designation.

Entered: July 11, 1989

For the Court: Miguel J. Cortez
Clerk

By:/s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: September 8, 1989

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

DWIGHT H. OWEN

v Case No. 88-404-CIV-T

-17B

HELEN OWEN

JUDGMENT IN A CIVIL CASE

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Bankruptcy Court's Decision is AFFIRMED.

Donald M. Cinnamond
Clerk

Date: June 7, 1988

/s/ Rita J. Cole
Deputy Clerk

FEDERAL

STATUTORY PROVISIONS INVOLVED

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11 U.S.C. § 522(b)

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties can

not agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which

the debtor had, immediately before the commencement of the case, an interest as tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C.§ 522(f)

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

(1) a judicial lien;

FLORIDA

CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Section 4, Florida Constitution

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the

extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Amended, general election, Nov. 7, 1972; general election, Nov. 6, 1984.

Article XI, Section 5, Florida Constitution

(c) If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

FLORIDA

STATUTORY PROVISIONS INVOLVED

Chapter 222.20, Florida Statutes

In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978 (11 USC s522(b)), residents of this state shall not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code of 1978 (11 USC s522(d)). Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes.

CASE NO: 89-1008

IN THE

SUPREME COURT OF THE
UNITED STATES

October Term 1989

DWIGHT H. OWEN

Petitioner

vs.

HELEN OWEN

Respondent

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Attorneys for
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

DWIGHT H. OWEN

Petitioner

vs.

HELEN OWEN

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

QUESTION PRESENTED

The sole question under review herein is whether or not the Petitioner has set forth a proper basis under 28 U.S.C. Section 1254(1) upon which this court may exercise its discretionary authority to issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT PURSUANT TO RULE 28.1

Dwight H. Owen is an individual Petitioner.

Helen Owen is an individual Respondent.

TABLE OF CONTENTS

INDEX TO PETITIONER'S APPENDIX*

* All references in Respondent's brief to an Appendix are to the Appendix submitted by Petitioner

TABLE OF AUTHORITIES

OPINIONS BELOW

The July 11, 1989, opinion of the United States Court of Appeals for the Eleventh Circuit, whose judgment the Petitioner seeks to have reviewed, is reported at 877 F.2d 44 (11th Cir. 1989) and is reprinted in the Appendix at A1. The prior opinion of the United States District Court for the Middle District of Florida, entered on June 7, 1988, is reported at 86 B.R. 691 (M.D. Fla. 1988), and is reprinted in the Appendix at A11. The prior opinion of the United States Bankruptcy Court for the Middle District of Florida, entered on February 8, 1988, was unreported and is reprinted in the Appendix at A21.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on the 11th day of July, 1989, and affirmed the decision of the United States District Court for the Middle District of Florida. (A1). A timely filed Petition for Rehearing and Suggestion for Rehearing In Banc were denied on the 31st day of August, 1989 (A25). The Petitioner alleges jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Title 11, United States Code Section 522(b), 522(f), reproduced at (A30-22).

Section 222.20, Florida Statutes (1985), reproduced at (A36).

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW.

Debtor filed a petition under Chapter 7 of Title 11 of the U.S. Code on January 13, 1986. Debtor was granted a discharge on May 13, 1986. Debtor filed an application to reopen this case on December 15, 1986. An order was entered reopening the case to allow the Debtor to pursue a lien avoidance action pursuant to 11 U.S.C. Section 522(f)(1) on April 20, 1987. Debtor filed a Motion to Avoid Lien on April 13, 1987. Creditor filed a response to Debtor's Motion to Avoid Judgment Lien on April 30, 1987. The Bankruptcy Court granted Debtor's Motion to Avoid Judgment Lien in its Order on Motion to Avoid Judgment

Lien dated December 1, 1987. Creditor filed a Motion to Amend or Make Additional Findings of Fact Pursuant to [Bankruptcy] Rule 7052(b) and to Alter or Amend the order on Motion to Avoid Judgment Lien Pursuant to [Bankruptcy] Rule 9023 on December 7, 1987. The Bankruptcy Court reversed its decision by finding that the judgment lien sought to be voided was not the type included within the ambit of 11 U.S.C. Section 522(f)(1), and accordingly, denied Debtor's Motion to Avoid Judgment Lien in its order on Motion to Amend or Make Additional Findings of Fact Pursuant to [Bankruptcy] Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to [Bankruptcy]

Rule 9023, dated February 8, 1988. Debtor filed his Notice of Appeal to the district court on February 16, 1988.

The district court affirmed the judgment of the bankruptcy court. A judgment in a civil case was thereafter entered on June 7, 1988, reflecting the district court's decision. Debtor filed a Notice of Appeal on June 21, 1988 to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed the district court. The Debtor filed a timely Petition for Writ of Certiorari on November 28, 1989.

II. THE FACTS.

The Respondent obtained a money judgment against the Petitioner in Circuit Court, Manatee County, Florida,

in December 1975. A certified copy of that judgment was recorded in the Public Records of Sarasota County, Florida, on July 29, 1976. At that time, Petitioner owned no property in Sarasota County.

On November 27, 1984, Petitioner acquired record fee ownership of the real property at issue herein, Unit 304 of Embassy House, a condominium, located in Sarasota County. At that time, Petitioner was a single man and not "the head of a family" as was then required for entitlement to the Florida Constitutional homestead exemption. Article 10, Section 4, Fla. Const.

On November 6, 1984, the citizens of Florida approved an amendment to the constitutional homestead provision which

substituted "a natural person" for the previously required "head of a family." (A33). That amendment became effective on January 8, 1985. Article 11, Section 5(c), Fla. Const. (A34).

On January 13, 1986, the Petitioner filed his Chapter 7 bankruptcy petition and claimed the above property as exempt as his homestead on his B-4 schedule, in accordance with Chapter 222.20, Florida Statutes (1985) (A36), the provision which limits Florida debtors to state, rather than federal, exemptions in bankruptcy. The Bankruptcy Court allowed this exemption for purposes of general administration of the estate.

In due course, the Petitioner received his bankruptcy discharge.

Thereafter, the court permitted the case to be reopened, at Petitioner's request, for the purpose of filing a Motion to Avoid Respondent's Lien pursuant to 11 U.S.C. Section 522(f). The order of February 8, 1988 (A21) in which the Bankruptcy Court held the lien to be unavoidable is the order appealed to the district court and subsequently to the court of appeals. The district court (A11) and court of appeals (A1) both affirmed the bankruptcy court.

III. ARGUMENT.

The lien sought to be avoided under 11 U.S.C. Section 522(f) by Petitioner/Creditor below is based upon a judgment which was obtained some ten years prior to the filing of a

bankruptcy petition. The judicial lien was not exempt under the Bankruptcy Code until after the judgment lien attached to the real property in question at the time the creditor purchased it. It did not become exempt until after an amendment to the Florida Constitution changing homestead exemption entitlements. Even then, under Florida case law, the exemption was subject to the prior existing judicial lien.

No case cited by Petitioner in support of his suggestion that there is a conflict among the courts of appeal deals with a factual case in which a long standing judicial lien preexists the status of exemption. Each of these court of appeals cases which are cited

by Petitioner deal with property which was exempt and liens which were imposed upon the exempt property by consent.

An examination of congressional intent regarding the applicability of 11 U.S.C. Section 522(f) confirms that it was never intended to allow avoidability except where its application would allow the creditor to enjoy an exemption. In the case below, the exemption only existed subject to a long standing prior lien.

REASONS FOR DENYING WRIT

None of the courts of appeals have dealt with the precise issue presented to the Court below. Consequently, there is no conflict between or among any of the circuits.

The setting of this case arises out of a statutory scheme of property exemptions of which debtors in bankruptcy can avail themselves. Upon the filing of a petition in bankruptcy, all of the Debtor's legal and equitable interests in property, with few exceptions not relevant here, become property of the estate. After the property comes into the estate, the debtor is allowed to exempt certain items under 11 U.S.C. Section 522(b). Congress specified the kinds and amount of property that may be exempted in 11 U.S.C. Section 522(d). In addition, Debtors may retain property defined

as exempt by other federal laws. 11 U.S.C. Section 522(b)(2)(A). Once the property is removed from the estate, the debtor may use it as his own. Liens valid in bankruptcy that cover exempt property, however, are preserved, and creditors holding such liens may enforce them against exempt property. 11 U.S.C. Section 522(c)(2). Title 11 U.S.C. Section 522(f), however, permits a Debtor to avoid certain kinds of liens encumbering particular kinds of property to the extent that the lien impairs an exemption. The Bankruptcy Code permits states to "opt-out" of the federal list of exemptions described in 11 U.S.C. Section 522(d), making them inapplicable

to their residents who file petitions for relief under the bankruptcy laws. 11 U.S.C. Section 522(b)(1)[1].

The Petitioner's argument is that the trial court should have allowed him to apply 11 U.S.C. Section 522(f) and avoid the lien and that the courts of

1. Section 522(b) provides in part:

***

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.

***

(1) Property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative, (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 day immediately preceding the date of the filing of the petition, or for a longer portion of such 180 day period than in any other place;...

***

appeals for the Second[2], Fourth[3], Eighth[4], Tenth[5], and Eleventh[6] Circuits would have so found and that the courts of appeals for the Fifth[7] and Sixth[8] Circuits are in conflict with those circuits and support the ruling below that the Petitioner seeks this Court's jurisdiction to appeal from.

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2. In Re Brown, 734 F.2d 119 (2d Cir. 1984)
3. Dominion Bank of the Cumberlands, NA v. Nuckolls, 780 F.2d 408 (4th Cir. 1985)
4 In Re Thompson, 750 F.2d 628 (8th Cir. 1984)
5. In Re Leonard, 866 F.2d 335 (10th Cir. 1989)
6. In Re Hall, 752 F.2d 582 (11th Cir. 1985)
7. In Re McManus, 681 F.2d 353 (5th Cir. 1982)
8. In Re Pine, 717 F.2d 281 (6th Cir. 1983) cert. den. 466 U.S. 928, 104 S.Ct. 711, 80 L.Ed. 2d 183 (1984)

Therein, argues the Petitioner, lies the conflict upon which this Court should grant a Writ of Certiorari.

Petitioner offers no satisfactory explanation as to why the Eleventh Circuit in In Re Hall, 752 F.2d at 582, is aligned with the majority of Circuits which he claims would support his position and then renders the opinion in the case below which he argues as being aligned with the Fifth and Sixth Circuits.

The key to that apparent anomaly lies in the unique factual scenario of the instant case which differentiates it from all seven of the cases cited by Petitioner in his effort to show the existence of a conflict. The

Respondent/Creditor below obtained a final judgment against the Debtor on December 1, 1975, and a certified copy was recorded in the Sarasota County Public Records on July 29, 1976. In November, 1984, the Debtor purchased certain real property in Sarasota County, Florida, and immediately upon acquiring the property the judgment of Creditor became a lien on the property. At the time the Debtor acquired the property and the judgment lien attached, the Debtor was not entitled to claim the property under the existing homestead exemption provision because he was not a "head of a family" as was required under the Florida Constitution. On November 6, 1984, an amendment to Article X, Section

4 was adopted by the citizens of Florida which substituted "a natural person" for "a head of a family." That amendment became effective on January 8, 1985. On January 13, 1986, Debtor filed his petition under Chapter 7, Title 11, of the United States Bankrutpcy Code, listing the condominium property as exempt as his household.

In short, the creditor's judgment was procured approximately one decade prior to Debtor seeking relief in bankruptcy; nearly eight years prior to the Debtor acquiring the subject property and over two months prior to the time the property became exempt.

These facts differ materially from each of the seven cases cited by

Petitioner in that in each of those cases the Debtor enjoyed an exemption in the property at the center of controversy prior to the time that the lien attached. Petitioner admits in his brief that his exempt status arose subsequent to the lien (Petition for Writ of Certiorari, page 5). The courts of appeals cases he relies upon to suggest a conflict do not address this issue.

This difference was an obviously crucial one in the rationale of the court below. At the conclusion of an

analysis of the Congressional intent[9] of 11 U.S.C. Section 522(f), it was the lower court's opinion that the facts of this case did not come within the penumbra of the intended scope of 11 U.S.C. Section 522(f) for the reason that: "The Debtor never held this property exempt from this judicial lien."

The most important factor, however, is that Petitioner has failed to

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9. The lower court opined that the legislative history of Section 522(f) indicates that Congress sought to protect debtors from the race to judgment often occurring just prior to a debtor filing bankruptcy. In order for the debtor to have a fresh start, this provision enabled liens to be removed from certain exempt property. Owen, 877 F.2d 47 and A9.

recognize this material difference of fact and has failed to set forth any, much less any convincing, argument which would explain why any of the courts of appeals for the circuits relied upon by the Petitioner would not reach the same result given the same set of facts considered by the case below.

Petitioner argues that one group of the conflicting circuits hold that federal law governs the applicability of 11 U.S.C. Section 522(f) and one group holds that state authority under 11 U.S.C. Section 522(b) to enact exclusive exemption plans includes the option to exclude encumbered property.

An analysis of the Sixth and Fifth Circuits rationales and holdings, though

admittedly speculative in that in addition to the factual difference, they were considering the import of state statutes specifically enacted under the "opt-out" authority of 11 U.S.C. Section 522(b)(2) rather than a state constitutional provision defining the very essence of an exemption, compels the conclusion that they are not inconsistent with the the lower court's decision: "...The Debtors may avoid liens only on that property which the states have declared to be exempt." In Re Pine, 717 F.2d at 284, citing McManus, 681 F.2d at 353, with approval. In Re Hall, 752 F.2d at 582, is

representative of the grouping of circuits, the decisions of which Petitioner advocates as being well reasoned, and yet that Court is clearly aligned with the lower court's own opinion. "It is true that (the statute prescribes the Debtors may not invoke their powers under Section 522(f) except to offset property that is exempt under 11 U.S.C. Section 522(b)." Id. at 586. This viewpoint is shared by each of the other cases in Petitioner's "aligned grouping." See, In Re Brown, 734 F.2d at 125; Dominion Bank, 780 F.2d, citing

In Re Hall, supra, with approval, at 412; In Re Thompson, 750 F.2d at 631;[10] In Re Leonard, 866 F.2d at 337.

Petitioner's quote from In Re Hall, 752 F.2d at 587, on page 13 of his brief:

> ...To permit states to inhibit the operation of the lien-avoidance provision simply by defining all lien-encumbered property as "not exempt" would render the statute, a result inconsistent with the well-established principle of statutory construction requiring that all parts of an act be given effect, if at all possible."

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10. Petitioner's grouping of this case with those aligned with In Re Hall, 752 F.2d at 582, is probably inadvertent. In Re Thompson, 750 F.2d 628, denies the application of the avoidance statutes after a discussion of congressional intent regarding Section 522(f) and then concludes rather subjectively that the transaction before it just was "...not the sort of law value personal goods in which "adhesion contract" security interests are taken." See page 631

stands in glaring juxtaposition to the fact that the instant case did not challenge a state legislated "opt-out" provision specifically promulgated under the authority of 11 U.S.C. Section 522(b)(2) which defined all lien encumbered property as not exempt and did not involve an asset which became exempt subject to a prior existing lien.

The illogicality of Petitioner's argument is best demonstrated by a simple hypothetical scenario in which: a Debtor owns two parcels of improved property; he lives in one and enjoys a homestead exemption in it; a judgment is entered against him which is perfected against the other or second non-homestead parcel; he sells the

homestead, moves to and sets up household on that previously non-homestead property; he improves it with the proceeds of the homestead sale and then seeks the protection of the Bankruptcy Court claiming a homestead exemption on the second parcel.

Petitioner's argument would require the application of 11 U.S.C. Section 522(f) and resulting removal of the judicial lien, a result never contemplated by Congress or any of the cases which Petitioner suggests are in conflict.[11]

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11. See footnote 9, page 19, supra.

The holding of the Court below and of In Re Hall, 752 F.2d at 582, are totally consistent given the materially different factual scenarios upon which they are based. Petitioner has failed to demonstrate the existence of a conflict; that is that any court of appeals would hold any differently than the Eleventh Circuit did given that the Debtor's exemption was never held in any manner other than subject to the creditor's judicial lien. The Petitioner must not only show the existence of a clear-cut conflict among the Circuits, it must be real and embarrassing. Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1955).

In this instance, it is nonexistent and the writ must be denied.

Petitioner suggests that In Re Pine, 717 F.2d at 281, and In Re McManus, 681 F.2d 353, have been ignored by some courts for the reason that they frustrate federal purpose and have ignored consideration of the supremacy clause. Those cases dealt issues arising out of the construction of state legislation promulgated under the authority of 11 U.S.C. Section 522(b) which were arguably in conflict with the purpose of 11 U.S.C. Section 522(f). The case below presents a state constitutionally defined exemption which came into being after the existence of the lien in question.

Without saying so, the Petitioner is suggesting that 11 U.S.C. Section 522(f) should preempt the Florida Constitution's prescription for homestead exemption. His only authority for such a proposition are the two cases cited in conjunction with his argument that the time of attachment of the lien does not matter: In Re Hershey, 50 B.R. 329 (S.D. Fla. 1985), and In Re Baxter, 19 B.R. 674 (Bankr. 9th Cir. 1982).

As a consequence of the opinion of the Eleventh Circuit in the case below, In Re Hershey, 50 B.R. at 329, has no precedential value. It must be assumed that if it had been appealed to the Eleventh Circuit it would have been reversed, and in any event, does not

represent the law of the Eleventh Circuit.

As for In Re Baxter, 19 B.R. at 674, the best argument that Petitioner can make is that it represents a potential conflict. He has cited no Ninth Circuit case which holds contrary to the decision below. An argument that the Ninth Circuit might so hold is hardly sufficient to invoke the standard for jurisdiction required by this Court. Rice, 349 U.S. at 70.

CONCLUSION

The Petition for Writ of Certiorari should be denied for the reasons that the Petitioner has failed: (A) To cite any case which has ruled upon the applicability of 11 U.S.C. Section

522(f) under the factual setting presented by the case below; (B) To show the existence of any conflict in opinions among the courts of appeals for the circuits and certainly none which are real and embarrassing; (C) To argue the presence of any issues of gravity and general interest or (D) To propose any other basis upon which jurisdiction under 28 U.S.C. Section 1254(1) might exist.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. MAIL to: ISIDORE KIRSHENBAUM, ESQ., 1900 Main Street, Suite 214, Sarasota, Florida 34236, this 8th day of April, 1990.

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Attorneys for Respondent

(3)

No. 89-1008

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

DWIGHT H. OWEN

Petitioner

vs

HELEN OWEN

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari
filed November 29, 1989
Certiorari Granted May 14, 1990

TABLE OF CONTENTS

Florida Statutes

RELEVANT DOCKET ENTRIES
(Complete)

United States Bankruptcy Court

Date of Filing		
01/13/86	Ex1	Voluntary Petition
01/23/86	Ex2	Objection to Debtor's Claim of exemptions by Helen Owen
01/28/86	Ex3	Request for Admissions by Helen Owen
02/18/86	Ex4	Motion to Stay Entry of Discharge by Helen Owen
02/18/86	Ex5	Motion to Condition Order of Discharge by Helen Owen
02/25/86	Ex6	Order that Motion to Stay Entry of Discharge be DENIED without prejudice
02/25/86	Ex7	Order that Motion to Condition Order of Discharge be DENIED without prejudice
03/05/86	Ex8	Proof of Claim and Power of Attorney by Helen Owen
05/19/86	Ex9	Discharge of Debtor
08/13/86	Ex10	Order on Objection to Claim of Exempt Property: Ordered that objection to exemption claim filed by Helen Owen be overruled and that subject property shall not be turned over to the Trustee

(cont.)

		for administration for the benefit of the creditors of the estate without further interference from the Bankruptcy Court
08/20/86	Ex11	Motion for Extension of Time by Helen Owen
08/26/86	Ex12	Order that time within which Helen M. Owen may file a Notice of Appeal from the order dated 08/13/86 be extended to 09/12/86
12/12/86	Ex13	Motion to Avoid Lien by Dwight H. Owen
12/16/86	Ex14	Application to Re-Open Chapter 7 case by Dwight H. Owen
12/19/86	Ex15	Order that Motion to Avoid Lien filed by Helen Owen be DENIED without prejudice
01/08/87	Ex16	Notice of Hearing on Application to Reopen Estate by Debtor
01/27/87	Ex17	Rescheduled Notice of Hearing on Application to Reopen Estae by Debtor
02/17/87	Ex18	2nd Rescheduled Notice of Hearing on Application to Reopen Estate by Debtor
03/20/87	Ex19	3rd Rescheduled Notice of Hearing on Application to Reopen Estate
04/13/87	Ex20	Motion to Avoid Lien by Debtor

04/20/87	Ex21	Order that Debtor's Motion to reopen be GRANTED; that this cause is reopened for the limited purpose of permitting Debtor to file a Motion to Avoid Lien within 30 days of the date of this order
04/23/87	Ex22	Order that respondent be directed to file written response be GRANTED
04/30/87	Ex23	Response to Motion to Avoid Lien by Helen Owen
05/26/87	Ex24	Notice of Hearing on Motion to Avoid Lien filed by Debtor
12/01/87	Ex25	Order that Motion to Avoid Judgment Lien of Helen Owen be GRANTED and the judgment lien of Helen Owens be deemed to be invalid and of no force and effect
12/07/87	Ex26	Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b), to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023, and for a new trial pursuant to Rule 9023 of the Bankruptcy Rules by Helen Owen
01/17/88	Ex27	Order granting creditors meeting
02/08/88	Ex28	Order that Motion to Amend be GRANTED; that Motion to Avoid Judgment Lien entered (cont.)

		be AMENDED; that Debtor's Motion to Avoid Judgment Lien be DENIED
02/16/88	Ex29	Notice of Appeal
02/23/88	Ex30	Designation of Record and Statement of Issues by Debtor
03/22/88	Ex31	Transcript of Motion Hearing 08/21/87

United States District Court

03/25/88	*	Notice to Counsel - letter advising of District Court Case Number sent to all counsel and bankruptcy court
04/04/88	2	Emergency Motion for Order Permitting the Filing of Appeal Brief in accordance with Rule 8010 of the Bankruptcy Rules of Procedure
04/04/88	3	Affidavit of Roger L. Fishell and proposed order attached
04/05/88	4	Supplemental Transmittal of Record to District Court with Certified Copy of Docket Sheet attached
04/05/88	5	Order that motion be GRANTED Appellant may file a brief in excess of 20 pages but not to exceed 35 pages and may exercise right to file a reply brief

04/07/88	6	Brief of Appellant
04/20/88	7	Brief of Appellee
04/28/88	8	Request for Oral Argument by Appellant
04/28/88	9	Reply Brief of Appellant
06/07/88	10	Order that Order on Motion to Amend or Make Additional Findings and to Alter or Amend Order on Motion to Avoid Judgment Lien filed 02/08/88 is AFFIRMED. The Clerk is directed to enter Judgment is accordance with this Order.
06/07/88	11	Judgment that the Bankruptcy Court's Decision is AFFIRMED
06/21/88	12	Notice of Appeal of order affirming Bankruptcy Court by Dwight Owen
06/21/88	*	Transmittal letter to USCA forwarding certified copies of docket entries, notice of appeal, order/judgment appealed from
06/27/88	13	Acknowledgment of Notice of Appeal by USCA
07/05/88	14	Motion to Temporarily Retain Record by Appellant. GRANTED
07/05/88	15	Appellant's Rule Certification

07/05/88	*	Correspondence from U. S. Court of Appeals requesting copies
08/05/88	*	Transmitted certified copy of Docket Sheet and Copy of Motion to Temporarily Retain Record by Appellant to USCA per request
10/27/88	*	Request from USCA to forward File FRAP Rule 11
10/31/88	*	Transmittal letter to USCA forwarding 1 volume of pleadings and 1 volume of exhibits

United States Court of Appeals

09/15/88	Brief of Appellant Dwight H. Owen and Records Excerpts
10/17/88	Brief of Appellee Helen Owen
10/25/88	Reply Brief of Appellant Dwight H. Owen
02/06/89	Oral Argument
07/11/89	Opinion of the United States Court of Appeals affirming the decision of the United States District Court
07/11/89	Judgment of the United States Court of Appeals affirming the judgment of the United States District Court

07/28/89 Petition for Rehearing and Suggestion for Rehearing In Banc filed by Dwight H. Owen

08/31/89 Order Denying Petition for Rehearing and Denying Suggestion for Rehearing In Banc

United States Supreme Court

11/29/89 Petition for Writ of Certiorari to United States Court of Appeals, 11th Circuit, filed by Dwight H. Owen

04/16/90 Respondent's Response to Petition for Writ of Certiorari filed by Helen Owen

05/14/90 Order Granting Petition for Writ of Certiorari

UNITED STATES BANKRUPTCY COURT

Order on Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023 (Printed as Appendix to Petition for Writ of Certiorari pp. A24 - A27).

UNITED STATES DISTRICT COURT

Order and Judgment Affirming Order on Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b) and to Alter or Amend Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023 (Printed as Appendix to Petition for Writ of Certiorari, pp. A13 - A23, A32).

UNITED STATES COURT OF APPEALS

Opinion and Judgment affirming the United States District Court (Printed as Appendix to Petition for Writ of Certiorari, pp. A1 - A12, A30 - A31).

Order Denying Petition for Rehearing and Suggestion for Rehearing In Banc (Printed as Appendix to Petition for Writ of Certiorari, pp. A28 - A29).

UNITED STATES SUPREME COURT

Order Granting Petition for Writ of Certiorari entered 14 May 1990.

FEDERAL

STATUTORY PROVISIONS INVOLVED

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11 U.S.C. § 522(b)

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties can

not agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which

the debtor had, immediately before the commencement of the case, an interest as tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C.§ 522(f)

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

(1) a judicial lien;

FLORIDA

CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Section 4, Florida Constitution

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the

extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Amended, general election, Nov. 7, 1972; general election, Nov. 6, 1984.

Article XI, Section 5, Florida Constitution

(c) If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

FLORIDA

STATUTORY PROVISIONS INVOLVED

Chapter 222.20, Florida Statutes

In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978 (11 USC s522(b)), residents of this state shall not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code of 1978 (11 USC s522(d)). Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes.

(4)

No. 89-1008

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

DWIGHT H. OWEN

Petitioner

vs

HELEN OWEN

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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Counsel for Petitioner

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly interpreted and applied 11 USC 522(f)(1) in denying lien avoidance, with respect to otherwise exempt property, based upon Florida law which provides that certain judgment or judicial liens create exceptions to the exemptions.

2. Whether a state law provision that creates exceptions to state homestead exemption for certain judgment liens based upon the time that the lien attaches is a permissible exemption provision for a state which has "opted out" of the federal exemptions when such "exception" is a judicial lien within the application of 11 USC 522(f)(1).

PARTIES TO THE PROCEEDINGS

Dwight H. Owen is an individual petitioner

Helen Owen is an individual respondent

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TABLE OF AUTHORITIES

Cases

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OTHER AUTHORITIES

OPINIONS BELOW

The order of the United States Bankruptcy Court entered on 8 February 1988 is not officially reported but is reprinted in the Petition for Writ of Certiorari at A24. The opinion of the United States District Court entered on 7 June 1988 is reported at 86 BR 691 (DC MD Fla 1988) and is reprinted in the Petition for Writ of Certiorari at A13. The opinion of the United States Court of Appeals for the Eleventh Circuit entered 11 July 1989 is reported at 877 F 2d 44 (11th Cir 1989) and is reprinted in the Petition for Writ of Certiorari at A1.

JURISDICTION

The court of appeals rendered its opinion and entered its judgment in favor of Creditor/Respondent, Helen Owen, on the 11th day of July 1989. (A1, A30). The Debtor/Petitioner, Dwight H. Owen, filed a petition for rehearing and suggestion for rehearing in banc on the 28th day of July 1989, pursuant to 11th Cir. Rule 35-2, and same was denied by the court of appeals on the 31st day of August 1989. (A28).

This Court has jurisdiction pursuant to 28 USC 1254(1) and the order granting the Petition for Writ of Certiorari dated the 14th day of May 1990.

FEDERAL

STATUTORY PROVISIONS INVOLVED

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11 U.S.C. § 522(b)

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(1) property that is specified under subsection (d) of this section, unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

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the debtor had, immediately before the commencement of the case, an interest as tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

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(2) personal property to the value of one thousand dollars..

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

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FLORIDA

STATUTORY PROVISIONS INVOLVED

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In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978 (11 USC s522(b)), residents of this state shall not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code of 1978 (11 USC s522(d)). Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes.

STATEMENT OF THE CASE

The facts of the case are not in dispute. (A2). The Creditor obtained a final money judgment against the Debtor in Manatee County Circuit Court on the 1st day of December 1975. (R. Ex10 p.2)[1] (A2). A certified copy thereof was recorded in Sarasota County, Florida on the 29th day of July 1976 at OR 1127, Page 1494, of the public records of Sarasota County. (R. Ex10 p.2)(A2). At that time, the Debtor did not own any interest in real property in Sarasota County. (R. Ex31 p.3) (A15).

On 27 November 1984, Debtor acquired

1. All filings in the Bankruptcy Court, numbering 31, were noted as Exhibits by the District Court and are therefore numbered in order of filing for reference purposes as (R. Ex1) to (R. Ex31). For filings initially made in the District Court, the Court assigned numerical listings by document and numbered them 2 through 15. For reference purposes those are noted as (R. 2) to (R. 15). A complete list appears in the Joint Appendix at (JA 1).

fee simple ownership of the real property at issue, Unit No 304, Embassy House, a condominium, located in Sarasota County, Florida. (R. Ex10 p.2). The deed to the Debtor was recorded on 27 November 1984 at OR 1732, Page 676 of the Public Records of Sarasota County. (A15). At that time, the Debtor was a single man and not the "head of a family" within the meaning of Article X, Section 4, of the Florida Constitution, the homestead provision. (R. Ex10 p.2) (A3).

On the 6th day of November 1984, an amendment to the homestead provision was adopted by the citizens of Florida which substituted "a natural person" for "a head of a family". Article X, Sec. 4, Fla. Const., (A16). That amendment was effective on the 8th day of January 1985. Article XI, Sec. 5, Fla. Const, (A3).

The Debtor filed his Chapter 7

petition on 13 January 1986 (R. Ex1) and claimed the above real property as exempt on his B-4 schedule in accordance with Art X, Section 4 of the Florida Constitution and Chapter 222.20, Florida Statutes. (R. Ex1 p.12). The Respondent/ Creditor objected to this claim of exemption, however the objection was overruled by the Bankruptcy Court in its order of 13 August 1986, which allowed the exemption and held the property to be immune from general administration by the Trustee. (R. Ex10). The lien avoidance question was not at issue and was specifically not determined by the Court. (R. Ex10 p.3).

Following his discharge, the Debtor moved to reopen the case for the purpose of moving to avoid the Creditor's lien. (R. Ex14). The Court reopened the case to determine the lien avoidance issue.

(R. Ex21). Pursuant to Bankruptcy Rules 4003(d) and 9014, the Debtor moved to avoid the lien. (R. Ex20). The Creditor responded, (R. Ex23), and the matter was argued before the court on 21 August 1987. (R. Ex31 Tr.).

At the hearing the Creditor did not contend that the Debtor had no right to the exemption nor that the exemption, if valid, was not impaired by the lien. The Creditor did not dispute that the lien was a judicial lien. (R. Ex31 p.8)

The Creditor contended essentially that 1) since Florida decisional law permitted enforcement, despite the homestead protection, then 11 USC 522(f) was not available, (R. Ex31 p.4), and 2) that 11 USC 522(f), by reference to legislative history, was meant to apply only to liens obtained shortly before bankruptcy. (R. Ex31 p.5,6)

The Debtor argued that the Creditor's position was, effectively, the "opt-out"

position disapproved in In Re Hershey, 50 BR 329 (DC SD Fla 1985) and in In Re Maddox, 713 F 2d 1526 (11th Cir 1983). (R. Ex31).

On the 1st day of December 1987, the bankruptcy court granted Debtor's motion, (R. Ex25), however, following the Creditor's timely 7052(b)/9023 motion, (R. Ex26), the court entered its ex parte order of 8 February 1988, (R. Ex28)(A24), denying lien avoidance. At (A26), the court stated,

> "Clearly, if at the time the certified copy of the judgment was recorded in the Public Records, the Debto owned the property but for whatever reason did not qualify to claim the property as homestead such judgment lien would be clearly nonavoidable under 522(f) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of 522(f)(1) and may not be avoided."

The only authority cited was In Re Williams, 38 BR 224 (Bankr ND Okla 1984) and In Re McCormick, 18 BR 911 (Bankr WD Pa 1981) (R. Ex25 p.2-3).

The Debtor timely appealed pursuant to Rule 8002(a) of the Bankruptcy Rules of Procedure on 16 February 1988. (R. Ex29).

The matter was submitted to the District Court on briefs, (R.#6), (R.#7) and (R.#9). The Debtor argued that 11 USC 522(f) could not be precluded of operation by state law, (R.#6 p.5, 17-26), that the case law relied upon was misapplied and that the entry of the 8 February 1988 order was not authorized by the applicable rules of procedure. (R.#6 p.27-28).

The District Court affirmed the order of the bankruptcy court in its entirety, (A23), and relied upon In Re Williams, above, and In Re McCormick, above. The Court, at (A22), stated,

> "A judicial lien which attached to an interest in property prior to the debtor's acquisition of that interest is not avoidable pursuant to 522(f)(1)."

The Debtor's timely appeal followed

on 21 June 1988. (R.#12), Rule 3(a), Federal Rules of Appellate Procedure.

The United States Court of Appeals affirmed the District Court but did not rely on the grounds or authorities cited below. The Court of Appeals found that, 1) because the lien in question created an exception to the homestead exemption under state law there was no impairment of any exemption and 2) that 11 USC 522(f)(1) was also unavailable because the debtor never owned the property free of the lien. (A9, A11).

A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied. (A28).

The Petition for Writ of Certiorari was filed citing the significance of the lien avoidance issue and the divergence existing among the circuits with respect to the proper interpretation of the lien

avoidance section when applied to state created exemptions. The Petition was granted on 14 May 1990.

SUMMARY OF ARGUMENT

The Court of Appeals erred in concluding that the judicial lien in this case could create an exception to an otherwise available state exemption and thereby render lien avoidance under 11 USC 522(f) unavailable to the Debtor. In reaching this result, the Court of Appeals failed to independently apply the lien avoidance provision to the state exemption provision.

If the decision of the Court of Appeals were to be sustained, state law could, by way of exemption definitions, evade lien avoidance and convert the concept of the "judicial lien as impairment" to "judicial lien as exception". Such a result would be improper under the language of the code because 1) there is no "state option" under 11 USC 522(f) and 2) 11 USC 522(f) could be rendered inoperative and meaningless.

The Debtor contends that he has met the code requirements for lien avoidance. Although denying relief, the courts below have identified little, if any, code language supporting such denial and the decisions are not completely consistent with one another. To sustain affirmance on any basis announced in the decisions below, this Court would be required to amend or supplement the language of the code or, in the case of the Court of Appeals decision, authorize emasculation of 11 USC 522(f) as a lien avoidance remedy.

11 USC 522(f) must be applied independently of state law definitions of exemptions. Failing that, the conflict, within the context of bankruptcy proceedings, which arises between state exemptions and federal lien avoidance would be improperly resolved in favor of state law.

This Court must reverse the Court of

Appeals decision in this case. Granting the Debtor the lien avoidance remedy is the only result which is consistent with code language and with proper balance between state exemptions and federal lien avoidance.

ARGUMENT

A. The Debtor meets the requirements of 11 USC 522(f)(1) even though Florida law creates an exception to the homestead exemption for property encumbered by certain judicial liens.

The lien avoidance section creates the following requirements for avoidance of described liens. First, the lien must be a judicial lien; second, the debtor must have an interest in the property to which the lien is attached and, third, the lien must impair an exemption to which the debtor would otherwise be entitled. See In Re Hahn, 60 BR 69 (Bankr D Minn 1985) and In Re Allman, 58 BR 790 (Bankr CD Ill 1986).

It is not disputed that the lien in this case is such a lien. The Code defines

a judicial lien as a "lien obtained by judgment, levy, sequestration or other legal or equitable process or proceeding." 11 USC 101(32). Under Florida law, a judgment becomes a lien upon real property when a certified copy of the judgment is recorded in the official records or judgment lien record of the county in which the property is located. Chapter 55.10, Fla. Stat., In Re Belize Airways, Ltd., 19 BR 840 (Bankr SD Fla 1982). A judgment against the debtor does not attach as a lien upon real property until real property is owned by the judgment debtor, Cheves v First National Bank of Gainesville, 83 So 870 (Fla 1919), however, a previously recorded judgment against the debtor attaches as a lien upon real property immediately upon acquisition of title by the judgment debtor. Porter-Mallard Co., et al., v Dugger, 157 So 429 (Fla 1934).

Consequently, the Creditor's judgment, duly recorded on 29 July 1976 in Sarasota County, attached as a lien upon the Debtor's real property at the time he acquired title on 27 November 1984. As a result, the Creditor's judgment constitutes a judicial lien within the meaning of 11 USC 522(f)(1).

The second requirement is also met because the Debtor acquired his interest in the property on 27 November 1984. As we have seen, acquisition of title was required in order for his creditor to have a lien. But for this acquisition, his creditor would have no lien. This same interest was claimed and allowed as exempt in the bankruptcy proceedings. (R. Ex10).

The third requirement, impairment of an otherwise available exemption, is also met because, 1) property of the type owned by the Debtor may be exempted as homestead, and 2) under Florida decisional law, see

Aetna Insurance Co. v LaGasse, 223 So 2d 727 (Fla 1967), Bessemer v Gersten, 381 So 2d 1344 (Fla 1980), a judgment attaching as a lien to property at a time when the Debtor is not eligible to claim the exemption will prevail over an after acquired right of homestead. Inasmuch as the exemptions which a debtor may assert, in bankruptcy, are those which are applicable on the date of the filing of the petition, see 11 USC 522(b)(2)(a), In Re Zahn, 605 F 2d 323 (7th Cir 1979) cert den 444 US 1075 (1980) the Debtor was entitled to assert the homestead exemption in this case. However, because state law allows a lien which attaches prior to acquisition of the homestead to remain enforceable against it, impairment exists.

The statutory language and legislative history supports avoidance in this case. First, the use, in 11 USC 522(f), of the

phrase, "...would have been entitled under sub-section (b)..." supports the contention that (f) was meant to apply in situations where enjoyment or assertion of an exemption was prevented by an encumbrance of the type described in (f)(1) and (f)(2). Secondly, the legislative history of the section accords with this argument wherein it is stated:

> "Subsection (f) protects the debtor's exemption, his discharge and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien... The avoidance power is independent of any waiver of exemptions"

H. Rep. No. 95-595, 95th Cong. 1st Sess. (1977) 362; S. Rep. No. 95-989, 95th Cong. (1978) 76 (under subsection e); U.S. Code Cong & Admin News 1978, pp. 5787, 6318.

B. The Courts below have, in each decision imposed additional requirements for lien avoidance which Congress did not see fit to require.

It was contended by the Creditor in her initial brief before the District Court (R.#7 p.7) that the lien must attach "shortly before" bankruptcy to be avoidable. No such requirement is found in the language of the code. In <u>In Re Latulippe</u>, 13 BR 528 (Bankr Vt 1981), the court noted in response to such argument, at p. 529, that

> "... (creditor) further contends that the avoidance of a judgment lien should be restricted to one obtained within the preference period, i.e. 90 days before the filing. There is no basis for this argument. The statute is clear and it contains no time limitation."

Similarly, in <u>In Re Lumpkins</u>, 12 BR 44 (Bankr RI 1981) the Court rejected a

similar contention, stating, at p. 45,

> "(creditor), however, offers no authority to support its contention that the §522 time parameters should be equated with those of §547."

Both the Bankruptcy court and the District Court placed substantial reliance upon In Re McCormick, 18 BR 911 (Bankr WD Pa 1982) affirmed 22 BR 997 (DC WD Pa 1982). At p. 914 of that opinion is the following language,

> "A judicial lien which attached to an interest in property prior to the debtor's acquisition of that interest is not avoidable pursuant to §522(f)(1)."

The above language was employed in both of the lower court opinions. (R. Ex25 p.3) and (A22). No basis within the Code is cited for this conclusion and there is none. In any event, that rule has no application in Owen

It appears that in McCormick, above, and in In Re Williams, 38 BR 224 (Bankr

ND Okla 1984), its companion case (which involved a consensual lien), each debtor acquired an enlarged or varied estate in the property. No such circumstance is present in Owen because Debtor held one and only one interest or estate in the property, i.e. sole ownership of the fee as of the date of the attachment of the lien, 27 November 1984. The after-acquired right of homestead did not alter or enlarge his interest or estate in the property. See Johns v Bowden, 66 So 155 (Fla 1914). Irrespective of the validity of the McCormick/Williams rule, it does not lend itself to the facts in Owen as there was, in Owen, no "pre-existing interest". Beyond that, the McCormick/Williams rule is without foundation in the language of the Code. See In Re Chandler, 77 BR 513, 519 (Bankr ED Pa 1987). Rather, the McCormick rule derives from what that opinion itself

categorizes as an "implicit assumption", 18 BR p. 913.

The Bankruptcy Court and District Court failed to recognize these factors and their reliance was misplaced.

C. State law which defines otherwise exempt property to be an "exception" to the exemption if encumbered by a judicial lien may not be given effect where to do so would defeat or evade the operation of of 11 USC 522(f)(1)

Whereas the lower courts interpreted 11 USC 522(f) to contain certain additional requirements for lien avoidance not to be found in its plain langauge, the Court of Appeals adopted a slightly different basis for denying lien avoidance. Contrary to prior 11th Circuit precedent set forth in In Re Hall, 752 F 2d 582 (11th Cir 1985), the court effectively authorized states to "opt out" of lien avoidance by the creation of exceptions to exemptions for lien encumbered property. This result should not be sustained because, quite obviously, where the "excepting" character-

istic is one of the characteristics described in f(1) or f(2), the concept of impairment disappears and the lien avoidance provision becomes meaningless and inoperative.

The principal set forth in Hall, above, and the recent cases of In Re Snow, 899 F 2d 337 (4th Cir 1990) and In Re Leonard, 866 F 2d 335 (10th Cir 1989), is that the lien avoidance provision must be independently applied. In Hall, above, the court, in reviewing a Georgia statute which permitted a debtor to exempt property only if it was not encumbered by a lien, stated:

> "This section 522(f) operates to permit a debtor to avoid the fixing of a lien on property if that avoidance would allow the debtor to enjoy the exemption. The very purpose of the statute is to permit debtors to claim, or exempt, property completely or partially secured by an otherwise valid lien. To permit states to inhibit the operation of the lien avoidance provision by simply defining all

> lien encumbered property as 'not exempt' would render the statute useless, a result inconsistent with well established principal of statutory construction requiring that all parts of an act be given effect if at all possible."

Snow, above, at p. 339, characterizes Hall as "... a direct holding that §522(f) allows a debtor to avoid a lien if such avoidance will allow a debtor to exempt property that state law would treat as non-exempt because of a lien." Had such a principal been applied in Owen, the Debtor would have clearly succeeded in avoiding the lien.

§522(f) is not an additional exemption provision, rather it is a process or mechanism to be applied to categories of exemptions. It is a federal remedy which, unlike §522(b), contains no "state option". Congress could have, but did not, grant to states powers or options under §522(f). The most logical conclusion to be reached regarding these two sections of the code is that because

they serve different purposes and perform different functions they must be applied independently.

§522(f) was designed to further debtor's fresh start by removing obstacles which the bankruptcy discharge itself did not remove, i.e. liens and encumbrances arising commonly and primarily under state law. It is not reasonable to conclude that Congress provided lien avoidance remedies which affected, primarily, encumbrances arising by virtue of state law and, at the same time, 'impliedly' relinquished to the states the power to evade that federal remedy through the means of exemption "exceptions". The decision of the Court of Appeals in Owen authorizes just such an outcome.

Given the nature of Federal Bankruptcy power and the peculiarly federal remedy provided by §522(f), any conflict produced

or arising by the application of state law must be resolved in favor of the application of federal law. See In Re Pelter, 64 BR 492 (Bankr WD Okla 1986), In Re Storer, 13 BR 1 (Bankr SD Ohio 1980) and Jones v Rath Packing Co., 430 US 519 (1977). Application of the foregoing principal does not have the effect of invalidating any state exemption law but merely requires that, within the limited context of bankruptcy proceedings, state law is suspended of operation to the extent that such conflict arises.

Rather than observe the foregoing principal, the Court of Appeals in Owen effectively renders §522(f) "subject to" state law and judicial lien as impairment becomes judicial lien as exception. Thus, state, rather than federal, law prevails. Such a result is nowhere supported by the language of the code and produces an un-

reasonable infringement of federal bankruptcy power.

CONCLUSION

The decision of the Court of Appeals can not be sustained upon any of the grounds cited by that court or the courts below because none of the reasons cited for non-avoidance finds firm footing in the code.

That decision should not be affirmed as it authorizes effective nullification of a significant federal bankruptcy provision without the slightest of evidence that Congress authorized such a result.

A reversal would produce a result completely consistent with the language of the statute, would assure the operation of all provisions of the code, create less disruption of the state/federal balance fixed by Congress.

No. 89-1008

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DWIGHT H. OWEN,
Petitioner

v.

HELEN OWEN,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Whether, under Section 522 of the Bankruptcy Code—which authorizes the states to establish categories of exempt property for purposes of bankruptcy—a state may limit its homestead exemption so as to preserve a judicial lien.

Whether Section 522(f) of the Bankruptcy Code, which provides for avoidance of certain liens on exempt property, was intended to require retroactive application of a state exemption statute to invalidate a pre-existing judicial lien.

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BRIEF FOR THE RESPONDENT

STATEMENT OF FACTS

In the course of a personal bankruptcy case brought under chapter 7 of the Bankruptcy Code, petitioner sought a discharge of further liability for his outstanding debts and exemption of his residence from the claims of creditors.[1] At the time petitioner commenced his chapter 7 case, Florida, pursuant to section 522(b) of the Bankruptcy Code, had adopted a homestead exemption,[2]

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[1] Appendix to Petition for Certiorari (hereinafter "Pet. A.") at 3-4. Citations to "J.A." are to the Joint Appendix. Citations to "Br." are to the Petitioner's Brief.

[2] 11 U.S.C. § 522(b); Fla. Const. art. 10, § 4(a)(1), J.A. 13-14.

exempting petitioner's condominium from being included in the bankruptcy estate, but not exempting that property from a preexisting lien in favor of respondent, his former spouse. The issue is whether section 522(f) of the Bankruptcy Code, 11 U.S.C. § 522(f), requires the bankruptcy court to avoid this lien, a lien that existed before the homestead exemption became effective and that was specifically preserved by state law.

Necessary to an understanding of this issue is a description of applicable federal bankruptcy law, the exemption provided under Florida law, and the facts of this particular case.

A. The Federal Bankruptcy System

Under chapter 7 of the Federal Bankruptcy Code, an individual may commence a bankruptcy case and seek an orderly liquidation of his assets in payment of his liabilities. Congress has long been concerned that individuals have the opportunity to make a so-called "fresh start" after the bankruptcy proceedings have been concluded.[3] Accordingly, one consequence of the bankruptcy proceeding is that most of the debtor's debts are discharged, that is, the debtor is no longer personally liable.[4] Federal bankruptcy law also provides, and has provided since 1898,[5] that state law may create exemptions in individual bankruptcy for certain property so that it is excluded from the bankruptcy estate and is immune from creditors.[6] In effect, federal law provides that a debtor

[3] *See, e.g., Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

[4] In this chapter 7 case, the governing provision is section 727 of the Code, 11 U.S.C. § 727. Section 523, 11 U.S.C. § 523, provides exceptions to discharge, and section 524, 11 U.S.C. § 524, specifies the effects of discharge.

[5] Section 6, 30 Stat. 544, 548 (1898).

[6] 11 U.S.C. § 522(b)(1). Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, provides that the commencement of a bankruptcy case creates an estate that broadly consists of all of the debtor's

"may exempt from property of the estate . . . any property that is exempt . . . under State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition . . . ."[7] As a consequence, exempt property is not sold (liquidated) in the course of the proceeding.

However, bankruptcy law has always shown a special solicitude for secured creditors. The mere fact that property is exempt from the bankruptcy estate does not avoid security interests in that property. And even though a debtor is discharged, the debtor's property may remain subject to a pre-existing security interest in favor of a creditor.[8] (A prime example would be a purchase money mortgage on a residence qualifying for a homestead exemption.)

Section 522(f) of the Bankruptcy Code defines the circumstances in which security interests in exempt property may be avoided (eliminated).

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property *to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b)* of this section [which specified the exemptions], if such lien is—
>
> (1) a judicial lien; or
>
> (2) a nonpossessory, nonpurchase-money security interest in [specified types of property].[9]

property. After the debtor has exempted property from the estate pursuant to section 522, property of the estate is distributed in a chapter 7 case pursuant to section 726 of the Code, 11 U.S.C. § 726.

[7] 11 U.S.C. § 522(b).

[8] *See Long v. Bullard*, 117 U.S. 617 (1886); 11 U.S.C. § 522(c) discussd below at pp. 19-22.

[9] 11 U.S.C. § 522(f) (emphasis supplied).

This case involves a judicial lien addressed by subsection (1).

B. The Background of this Case

In December 1975, respondent obtained a money judgment against the petitioner in Florida state court in the amount of $158,703.[10] A copy of the judgment was recorded in the public records of Sarasota County, Florida, on July 29, 1976.[11] The petitioner owned no property in Sarasota County at that time, but under Florida law the judgment would attach to any after-acquired property.[12]

On November 27, 1984, the petitioner acquired a condominium in Sarasota County.[13] At the time of the purchase, the condominium did not qualify for a homestead exemption from judgment liens under article 10, section 4 of the Florida Constitution, because the petitioner was a single man and the exemption was only available to the "head of a family." [14] However, on January 8, 1985,

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[10] Pet. A. 2, 15. The dollar amount appears in the Order cited in note 20 *infra*.

[11] *Id.*

[12] Pet. A. 2.

[13] Pet. A. 3, 15.

[14] Pet. A. 3, 15-16. In November 1984, article 10, section 4(a)(1) of the Florida Constitution had provided for a homestead exemption as follows:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by the head of a family:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.

after the lien attached, an amendment to the Florida Constitution became effective extending the exemption to single individuals.[15] With certain exceptions not applicable here, the amendment provided that "no judgment . . . shall be a lien" on a homestead "owned by a natural person." [16] Respondent's lien remained effective both because (1) under Florida law, where a debtor qualifies for a homestead exemption only after a judgment lien has attached to his property, the property is not exempt from the lien,[17] and (2) respondent's lien attached to the petitioner's condominium before the effective date of the constitutional amendment, and the amendment did not apply retroactively to destroy the lien.[18]

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[15] The amendment was adopted before the lien attached but became effective only after it attached. Article 11, section 5(c) for the Florida Constitution provides:

> If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

Pet. A. 38. Thus the amendment became effective on January 8, 1985.

[16] Fla. Const. art. 10, § 4(a)(1), Pet. A. 36-37.

[17] *E.g., Lyon v. Arnold*, 46 F.2d 451, 452 (5th Cir. 1931) (construing Florida law); *Bessemer v. Gersten*, 381 So. 2d 1344, 1347 n.1 (Fla. 1980); *Aetna Insurance Co. v. LaGasse*, 223 So. 2d 727, 728 (Fla. 1969).

[18] *Pasco v. Harley*, 75 So. 30, 33 (Fla. 1917) ("homestead 'exemptions' do not exist as against a judgment obtained or conveyance made before the exemption was provided for by law"); *Matthews v. Jeacle*, 61 Fla. 686, 55 So. 865, 867 (1911) (Florida homestead exemption did not operate retroactively); *accord Keystone Water Co. v. Bevis*, 278 So. 2d 606, 608-09 (Fla. 1973) (a statute "is not to be given retrospective application unless it is required by the terms of the [s]tatute or it is unequivocally implied").

On January 13, 1986, petitioner commenced a chapter 7 bankruptcy case.[19] In schedules accompanying the petition, petitioner listed himself as owing debts which exceeded the total amount of his assets. Among the assets was petitioner's condominium, which he valued at $135,000. Among his liabilities were two debts totalling in excess of $346,000 owed to his former spouse, respondent in this case.[20]

Petitioner sought to discharge respondent's debts and at the same time to preserve his ownership in the condominium.[21] Accordingly, the petitioner claimed his condominium as exempt Florida homestead property pursuant to the newly adopted Florida constitutional provision.[22] There was no dispute that the debt would be discharged as a personal liability of the debtor. It was also clear that unsecured debts could not be enforced against the condominium, because the Florida exemption for single persons was effective at the time of the bankruptcy filing. In May 1986, the bankruptcy court granted petitioner a discharge.[23] Three months later, that court sustained the claimed exemption.[24]

After his discharge, the petitioner, apparently realizing for the first time that his condominium remained subject to respondent's lien, moved to reopen his chapter 7 case and to avoid respondent's judicial lien, pursuant to 11

[19] Pet. A. 16.

[20] *In re Owen*, Order on Objection to Claim of Exempt Property, United States Bankruptcy Court for the Middle District of Florida, Tampa Division, No. 86-106, at 2, Aug. 13, 1986; Schedule of Current Income and Current Expenditures, Jan. 13, 1986. These documents were part of the record in the bankruptcy court but were not included in the record on appeal. They have been lodged with the Clerk of this Court.

[21] Pet. A. 16-17.

[22] Pet. A. 16.

[23] J.A. 1; Pet. A. 17..

[24] J.A. 1-2.

U.S.C. § 522(f)(1), so that petitioner could retain the homestead property lien-free.[25] The bankruptcy court reopened the bankruptcy case but, in February 1988, denied the petitioner's motion to avoid respondent's judicial lien.[26] Finding that the judicial lien had attached before the petitioner's condominium qualified for the homestead exemption, the bankruptcy court concluded that the lien could not be avoided under section 522(f)(1) of the Bankruptcy Code.[27] The District Court for the Middle District of Florida affirmed, agreeing that the lien could not be avoided because it attached to petitioner's condominium before the property qualified for the exemption.[28] In affirming the district court, the Eleventh Circuit noted that petitioner

> argue[d] that federal law [gave] him an exemption that state law would not, even though the exemptions in Florida are defined by state law because of its 'opting out' of the federal exemption.

Congress did not intend through section 522(f), however, to provide a federal exemption greater

[25] J.A. 2.

[26] The bankruptcy court at first granted petitioner's motion to avoid the judicial lien. J.A. 3. After the respondent filed a timely motion to amend the initial order, the bankruptcy court reversed its initial ruling. J.A. 3-4.

[27] Pet. A. 26. The bankruptcy court stated, in pertinent part:

> Clearly, if at the time the certified copy of the Judgment was recorded in the Public Records, the Debtor owned the property but for whatever reason did not qualify to claim the property as homestead, such judgment lien would be clearly nonavoidable under § 522(f)(1) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of § 522(f)(1) and may not be avoided.

Pet. A. 25-26.

[28] Pet. A. 22-23; 86 Bankr. 691, 694 (M.D. Fla. 1988).

than that protected by state law where the exemption is created by state law.[29]

The court concluded that

> [w]here, as here, the judgment attached prior to the homestead right, there is no impairment because the exemption is specifically subject to this exception.[30]

The court held that respondent's lien could not be avoided under section 522(f).

In view of a conflict in the circuits, this Court granted the petition for certiorari on May 14, 1990.

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[29] 877 F.2d at 47, Pet. A. 9-10.

[30] *Id.* Petitioner has pointed out that the Eleventh Circuit decision in this case appears to conflict with that circuit's decision in *In re Hall*. Br. at 30. In *In re Hall*, 752 F.2d 582 (11th Cir. 1985), a panel of the Eleventh Circuit found that the Georgia legislature had defined exemptions in a manner which precluded debtors from avoiding liens under section 522(f), and held that Georgia had no authority to do so. However, in *In re Bland*, 793 F.2d 1172, 1174 (11th Cir. 1986), the Eleventh Circuit sitting *en banc* found that "the *Hall* panel moved too quickly to the question of whether a state can opt out of section 522(f)" because the Georgia legislature had not intended to limit exempt property to unencumbered property. The court declined to decide whether a state can override section 522(f) by defining available exemptions to exclude encumbered property. *Id.* at 1175 n.5. While the Eleventh Circuit opinion in this case did not discuss either *Hall* or *Bland*, the court appeared to be rejecting the position it took in *Hall* when it concluded that Congress "did not intend through Section 522(f) . . . to provide a federal exemption greater than that protected by state law where the exemption is created by state law." 877 F.2d at 47. We note that, in a concurring opinion in *Bland*, Judge Hill concluded that "the only way to determine whether or not the debtor may avail himself of the lien avoidance provision is to consult state law. Federal law places no limits on the generosity or lack thereof with which states may define such exemptions." 793 F.2d at 1176 (concurring dubitante).

SUMMARY OF ARGUMENT

I. To assist individual debtors to make a "fresh start" after bankruptcy, section 522(b) of the Bankruptcy Code, 11 U.S.C. § 522(b), allows a debtor to "exempt from property of the estate . . . any property that is exempt . . . under State or local law that is applicable on the date of the filing of the petition at the place [of] the debtor's domicile . . . ." The effect of such an exemption is that the exempted property is not sold in the course of the bankruptcy proceeding to satisfy the claims of creditors.

In the 1978 Bankruptcy Code, Congress conferred on the states broad power to define bankruptcy exemptions pursuant to section 522(b). The State of Florida, while exempting homestead property from the claims of unsecured creditors, has limited that exemption to preserve liens, such as the one involved here, that predated the effective date of the state's homestead exemption. There is nothing in section 522(b) or its legislative history that suggests that Congress intended to deny states the power to so limit their exemptions. In fact, that legislative history shows that Congress consistently rejected proposals to limit state power to define exemptions—proposals to impose a uniform list of federal exemptions or to adopt an alternative list of federal exemptions that would have been available to debtors regardless of state law.

Petitioner's suggestion that section 522(f) of the Code, 11 U.S.C. § 522(f), was designed to limit state power is untenable. Section 522(f) was a new provision included in the 1978 Bankruptcy Code. It provides that certain liens on exempt property may be avoided (eliminated) if they impair an exemption "to which the debtor would have been entitled under" section 522(b). Here there is no exemption to which the debtor "would have been entitled" since the Florida exemption preserved the lien.

The legislative history of section 522(f) shows that it was not designed to limit state power to define exemptions but rather to make available exemptions effective. Before the enactment of section 522(b), this Court's decision in *Long v. Bullard*, 117 U.S. 617 (1886), had construed federal bankruptcy law to preserve liens in exempt property. Section 522(f) partially repealed the effect of this Court's decision in *Long v. Bullard* and thus eliminated this federal impediment to the effectuation of exemption policy. It was not designed to override the states' policy choices reflected in their exemption statutes.

II. Even if a state exemption provision could not limit the exemption to preserve liens on otherwise exempt property, section 522(f) should not be construed to require retroactive application of state exemption statutes to liens predating the creation of the state exemptions. This Court has long made clear that federal legislation, particularly in the bankruptcy area, should not be construed to operate retroactively absent a clearly manifested Congressional intent. This Court in *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), specifically held that section 522(f) should not be construed to avoid liens arising before its enactment in 1978. Similarly section 522(f) should not be construed as requiring the retroactive application of state law where, as here, the state has decided that its own exemption statute should not operate to avoid liens created before the effective date of the exemption. There is no federal policy that could possibly be served by compelling states to apply their exemption statutes retroactively, and there is no indication in the language of the Bankruptcy Code or its legislative history remotely suggesting any such purpose.

ARGUMENT

In urging this Court to reverse the decision below, petitioner argues that section 522(f)(1) of the Bankruptcy Code "must be applied independently of state law definitions of exemptions."[31] This argument is wrong for two separate reasons. First, as we discuss in Part I below, it ignores the language of section 522(f)(1), which permits a debtor to avoid a judicial lien only if the lien impairs an exemption "to which the debtor would have been entitled under" applicable law. The debtor here was entitled to an exemption under state law only to the extent of the property not subject to a lien, and accordingly the lien did not interfere with any exemption "to which the debtor would have been entitled." Second, as we discuss in Part II below, even if sections 522(b) and 522(f) of the Bankruptcy Code were read as denying Florida the power to limit the exemption to unencumbered property, those sections should not be construed to require retroactive application of state exemption statutes to invalidate pre-existing liens.

I. PETITIONER WAS NOT ENTITLED TO AN EXEMPTION, AND ACCORDINGLY CANNOT AVOID THE LIEN.

As petitioner appears to concede,[32] section 522(f) can be employed to avoid a judicial lien only in those situations where the lien "impairs an exemption to which the debtor would have been entitled under subsection (b)" of section 522.[33] Here it is clear that that condition is not satisfied because Florida law, and hence section 522(b), does not create an exemption for this property to the extent that it is subject to a pre-existing lien.[34] In de-

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[31] Br. at 19.

[32] Br. at 21, 23.

[33] 11 U.S.C. § 522(f).

[34] *See* p. 5 *supra*.

fining the scope of the exemption, Florida was doing what Congress contemplated it would do and empowered it to do.

A. Congress Conferred on the States Broad Power To Define Bankruptcy Exemptions.

In individual bankruptcy the Bankruptcy Code seeks to reconcile the claims of creditors with the so-called "fresh start" policy designed to assist the individual bankrupt's rehabilitation.[35] That reconciliation is generally reflected in two provisions of the Bankruptcy Code. The first of these—the provision for discharge—is governed entirely by federal law.[36] This provision generally provides that the individual debtor will receive a discharge in bankruptcy which will eliminate his personal liability for his debts.[37]

The second aspect of this reconciliation between creditor claims and the need for a "fresh start" is reflected in the Bankruptcy Code provisions concerning exemptions.[38] These exemptions exempt some limited portion of the debtor's property from the claims of creditors by permitting the debtor to exclude the exempt property from the bankruptcy estate and hence to prevent its liquidation and sale to satisfy the claims of creditors.[39] The states

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[35] *See* note 3 *supra*; *see generally* T. Jackson, *The Logic and Limits of Bankruptcy Law*, 225-52 (1986).

[36] *See* T. Jackson, *The Logic and Limits of Bankruptcy Law*, 254 (1986). *See also* 11 U.S.C. § 722 (redemption).

[37] *See* note 4 *supra*.

[38] *See* T. Jackson, *The Logic and Limits of Bankruptcy Law*, 254-59. *See also* 123 Cong. Rec. H35444, H35452 (daily ed. Oct. 27, 1977) (statements of Mr. Edwards and Mr. Drinan) (legislative history of the 1978 Bankruptcy Code recognizing the importance of exemptions to the "fresh start" policy).

[39] 11 U.S.C. § 522(b).

are specifically empowered by section 522(b) of the Code to define the scope of the exemptions.[40]

Section 522 was adopted as part of the Bankruptcy Reform Act of 1978[41] and was considered against the background of the former Bankruptcy Act, enacted in 1898.[42] The Bankruptcy Act of 1898 did not itself define the exemptions to which an individual would be entitled upon filing a bankruptcy petition. Rather Congress allowed the scope of a debtor's exemptions to be defined principally by reference to state law.[43] The exemptions many states provided were limited in scope and amount.[44] Limitations such as those involved here on a debtor's right to exempt property interests encumbered by judicial liens were not uncommon.[45] A number of state statutes

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[40] 11 U.S.C. § 522(b)(2)(A) ("an individual debtor may exempt from property of the estate . . . any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law . . .").

[41] 11 U.S.C. §§ 101 *et seq.*

[42] 30 Stat. 544 (1898).

[43] Section 6, 30 Stat. 544, 548 (1898). That Act, in section 6, permitted "bankrupts" to claim "the exemptions which are prescribed by the [non-bankruptcy] laws of the United States or by the State laws in force at the time of the filing of the petition. . . ." In earlier bankruptcy acts, federal law or a combination of federal and state law had governed exemptions. *See* 3 *Collier on Bankruptcy*, ¶ 522.01, at 522-8 to 522-9 (15th ed. 1989). Constitutional challenges to the adoption of state exemptions on the ground that this made federal bankruptcy law impermissibly non-uniform have been consistently rejected. *See, e.g., Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

[44] Professor Countryman described the limited scope of state exemption in *For a New Exemption Policy in Bankruptcy*, 14 Rutgers L. Rev. 678 (1960). *See also* Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 Iowa L. Rev. 445 (1960).

[45] Florida's rule preserving judicial liens which attached to property before the property qualified for an exemption long predated the Bankruptcy Code. *See Lyon v. Arnold*, 46 F.2d 451 (5th Cir.

modified the definition of exemption under state law to generally exclude property encumbered by valid liens. Some of these statutes substantially predated the Bankruptcy Code.[46] While there is no indication that, at the time that it considered the 1978 Code, Congress specifically focused on state statutes that defined exemptions to exclude lien-encumbered property, Congress was certainly aware of the discretion states had exercised in defining and limiting exemptions and that this had resulted in disparate results in different parts of the country.[47] Although some in Congress sought to change the bank-

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1931); *Lamb v. Ralston Purina Co.*, 21 So. 2d 127, 132 (Fla. 1945); *Pasco v. Harley*, 75 So. at 33. California law provided that a judgment lien prevailed if it attached to property before the debtor filed a homestead declaration as to the property. *See Esten v. Cheek*, 254 F.2d 667 (9th Cir. 1958); *Schuler-Knox Co. v. Smith*, 62 Cal. App. 2d 86, 144 P.2d 47, 53 (1944); *Carey v. Douthitt*, 140 Cal. App. 409, 35 P.2d 632 (1934). Independently, California courts construed that state's exemption provisions to operate prospectively only. *England v. Sanderson*, 236 F.2d 641, 642 & n.2 (9th Cir. 1956), *citing Application of Rauer's Collection Co.*, 87 Cal. App. 2d 248, 253, 196 P.2d 803, 807-08 (1948).

[46] *See* Haines, *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, 1983 Ariz. L.J. 1, 26 n.153 *citing* Ariz. Rev. Stat. Ann. § 33-1122 (Supp. 1982-1983) (enacted 1976); Ark. Const. art. 9, § 3 (1947); Hawaii Rev. Stat. § 651-122 (Supp. 1982) (enacted 1976, amended 1978); N.M. Stat. Ann. § 42-10-6 (Supp. 1978) (enacted 1971).

[47] *See* H.R. Rep. No. 595, 95th Cong., 1st Sess., at 126 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6087 (criticizing "[m]ost" state exemption laws as "outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for modern urban dwellers"); 124 Cong. Rec. S14721-22 (daily ed. Sept. 7, 1978) (remarks of Sen. Thurmond) (advocating "the approach of current law which adopts the exemption law of the State in which the debtor is located" as the "fairer way [which] allow[s] a fresh start, but on a limited basis").

ruptcy statute's dependence on state law for definition of exempt property, they ultimately failed to do so.

The Bankruptcy Commission Report, which formed the basis for the 1978 Bankruptcy Code, recommended that a system of federal exemptions be adopted, replacing entirely the state exemptions permitted by the Bankruptcy Act. The concern was that state exemptions had in some states been too generous and in others too restrictive and that overall uniformity was required for the federal bankruptcy system.[48] This approach of federalizing the exemptions did not win favor in the Senate or the House, but efforts to curtail the power of the states to define exemptions continued. The House sought to create greater uniformity nationwide by establishing a federal list of exemptions contained in the Bankruptcy Code and giving the debtor the option of selecting either the Code's list of exemptions or exemptions in the debtor's state of domicile.[49] The Senate rejected this proposal. Seeking to

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[48] Report of the Commission on the Bankruptcy Laws of the United States ("Commission Report"), H.R. Doc. No. 137, 93d Cong., 1st Sess., Pts. I and II, at 170-71 (1973). *See also Bankruptcy Reform Act of 1978: Hearings on S.235 and S.236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., at 36 (1975) (statement of Harold Marsh, Jr., Chairman of Comm'n on Bankruptcy Laws of the United States) ("in same [sic] States the level of exemption is highly unreasonable in both directions").

[49] Section 522(b) of the House bill, H.R. 8200, provided in pertinent part:

> (b) Notwithstanding section 541 of this title, an individual may exempt from property of the estate *either*—
>
> (1) property that is specified under subsection (d) of this section; or, *in the alternative*,
>
> (2)(A) any property that is exempt under Federal, State, or local law, other than subsection (d) of this section . . . .

(emphasis supplied).

The so-called judges' bill, which was also important in shaping Congressional thinking, included a similar proposal that would

preserve the discretion of the states to prescribe exemptions, the Senate passed a bill which did not contain a list of federal bankruptcy exemptions, but rather provided that an individual could exempt from property of the estate "any property that is exempt under Federal [non-bankruptcy], State, or local law . . . ." [50] The Senate and House reached a compromise by enacting, in section 522(d) of the Code, a list of federal exemptions and, at the same time, allowing the states, by legislation, to preclude debtors from choosing the new federal exemptions as an alternative to state exemptions in bankruptcy

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have given "the debtor an option to choose State law exemptions or the federal laws but put a maximum of $25,000 on the exemptions that can be claimed under the Federal bankruptcy laws." *Bankruptcy Reform Act of 1978: Hearings on S.235 and S.236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., at 25 (1975) (statement of Frank Kennedy, Executive Director of Comm'n on Bankruptcy Laws of the United States).

[50] Section 522(b) of the initial Senate bill, S. 2266, was substantially the same as the exemption provision under the former Bankruptcy Act. S. Rep. No. 989, 95th Cong., 2d Sess., at 75 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5861. The Report of the Senate Judiciary Committee on S. 2266 listed some of the items that may be exempted under federal laws other than the Bankruptcy Code:

> Foreign Service Retirement and Disability payments, 22 U.S.C. 1104; Social security payments, 42 U.S.C. 407; Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717; Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601; Civil service retirement benefits, 5 U.S.C. 729, 2265; Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. 916; Railroad Retirement Act annuities and pensions, 45 U.S.C. 228(L); Veterans benefits, 45 U.S.C. 352(E); Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101; and Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. 175.

Id.

cases.[51] To satisfy the Senate, this compromise imposed no limits on the states' discretion to define their exemptions.

As a result of this legislative compromise, section 522(b) of the Code provides that an individual debtor may exempt either property listed in section 522(d) of the Code or "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law . . . ." The Code also permits states to "opt out" of section 522(d) and thereby preclude debtors from choosing the list of federal exemptions appearing in that section.[52] Florida became one of the states banning debtor election of the federal list of exemptions.[53]

The legislative history of section 522(b) confirms Congress' intent to give states broad discretion to define exemptions. The Report of the Senate Judiciary Committee accompanying the Senate's bill, S. 2266, mentioned no limits on the discretion of states in defining exemptions. The Report in fact indicated that the exemption provision of the bill, section 522(b), "track[ed] current

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[51] 124 Cong. Rec. H11095 (daily ed. Sept. 28, 1978) (joint explanatory statement of the House and Senate floor managers explaining compromises that were reached) ("Section 522 of the House amendment represents a compromise on the issue of exemptions between the position taken in the House bill, and that taken in the Senate amendment. Dollar amounts specified in section 522(d) of the House bill have been reduced from amounts as contained in H.R. 8200 as passed by the House. The States may, by passing a law, determine whether the Federal exemptions will apply as an alternative to State exemptions in bankruptcy cases").

[52] 11 U.S.C. § 522(b)(1) ("an individual debtor may exempt from property of the estate . . . property that is specified under subsection (d) of this section, *unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize* . . .") (emphasis added).

[53] Chapter 222.20, Florida Statutes, J.A. 16. Thirty-five states have enacted legislation prohibiting citizens from electing the federal exemptions contained in 11 U.S.C. § 522(d). 3 *Collier on Bankruptcy*, ¶ 522.02, at 522-11 n.4 (15th ed. 1989) (listing states). Of course, even where a state has opted-out, federal non-bankruptcy exemptions remain available. 11 U.S.C. § 522(b)(2)(A).

law." [54] Even the House Report, in urging the approach ultimately rejected by the Conference Committee, recognized that "the circumstances do vary in different parts of the country" and continued to permit states "to set exemption levels appropriate to the locale" under the optional provision.[55] The legislative history accompanying the House-Senate compromise on section 522(b) contains no suggestion that Congress intended to limit the discretion of States in defining exemptions.[56]

B. Section 522(f) Was Designed To Protect State and Federal Policy Choices Reflected in the Exemption Provisions, Not To Supercede Those Choices.

At the same time that Congress in section 522(b) authorized the states to create exemptions and created an alternative list of federal exemptions, Congress in other portions of section 522 sought to protect the policy choices reflected in the state or federal exemptions. Such action was necessary because the creation of exemptions, in and of itself, would not protect the property from certain types of claims. Thus Congress provided in:

—subsection (c), that the exempt property was not liable "during or after the case" for pre-existing debts with the exception of certain non-dischargeable debts (generally taxes, alimony, and child-support payments) and non-avoidable liens;

—subsection (e), that waivers of exemptions in favor of unsecured creditors would be ineffective;

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[54] S. Rep. No. 989, 95th Cong., 2d Sess., at 75 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5861. *See also* 124 Cong. Rec. S14719 (daily ed. Sept. 7, 1978) (remarks of Sen. Wallop) ("the current law allowing States to determine the property exemptions that debtors will have for their fresh start after bankruptcy will be retained").

[55] H.R. Rep. No. 595, 95th Cong., 1st Sess., at 126 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6087.

[56] *See* 124 Cong. Rec. H11095 (daily ed. Sept. 28, 1978).

—subsection (f), that "[n]otwithstanding any waiver of exemptions," certain liens in exempt property would be avoided "to the extent that such lien[s] impair[] an exemption to which the debtor would have been entitled under subsection (b) . . .";

—subsections (g), (h), and (i), that the debtor could exempt certain property recovered by the trustee (or the debtor himself) under the so-called avoiding powers; [57] and

—subsection (k), that the exempt property would be liable for administrative expenses of the bankruptcy case only to a limited extent.[58]

The need for a provision such as section 522(f) was particularly important in light of this Court's 1886 decision in *Long v. Bullard*, 117 U.S. 617 (1886). In that case, Long and his wife had mortgaged exempt homestead property to Bullard. After Long had received a discharge in bankruptcy, Bullard brought an action seeking to compel a judicial sale of the exempt property to pay off the debt. In rejecting the Longs' claim that the mortgage was no longer effective, this Court stated:

> [Bullard's] security was preserved notwithstanding the bankruptcy of his debtor . . . .
>
> The setting apart of the homestead to the bankrupt under § 5045 of the Revised Statutes [providing for exemptions] did not relieve the property from the operation of liens created by contract before the bankruptcy.[59]

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[57] Under the Bankruptcy Code, the trustee is able to avoid preferential, fraudulent, and certain other transfers. *E.g.*, 11 U.S.C. §§ 544, 547, 548, 549, and 550. *See generally* 4 *Collier on Bankruptcy*, Chapters 544, 547, 548, 550 (15th ed. 1989).

[58] *See* 11 U.S.C. § 522(c), (e)-(i), (k).

[59] 117 U.S. at 620-21.

This Court thus held that neither the debtor's discharge nor state exemption of the debtor's property protects that property from holders of secured interests.

Congress in the 1898 Act did not alter that rule. The situation prevailing under the 1898 Act was described by Justice Brandeis in *Louisville Bank v. Radford*, 295 U.S. 555 (1935), as follows:

> Some States had granted to debtors extensive exemptions of unencumbered property from liability to seizure in satisfaction of debts; and these exemptions were recognized by the bankruptcy act of 1867, as well as that of 1898. But unless the mortgagee released his security, in order to prove in bankruptcy for the full amount of the debt, *a mortgage even of exempt property was not disturbed by bankruptcy proceedings.*[60]

Thus, the 1898 Act looked to state law for the definition of exemptions, but federal law preserved security interests in exempt property pursuant to this Court's decision in *Long v. Bullard.*

The drafters of the 1978 Code sought to change this federal lien preservation policy in some respects and thus to afford greater protection for the exemptions defined by state or federal law. This goal was accomplished by providing:

—in section 522(c), that "property exempted . . . is not liable during or after the case for any debt . . . that arose . . . before the commencement of the case, except . . . (2) a debt secured by a lien that is [not avoided];" and

—in section 522(f), that certain liens that might exist in the exempt property would be avoided.

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[60] *Id.* at 582-83, *citing Long v. Bullard*, 117 U.S. 617 (emphasis supplied).

This lien avoidance extended only to two specified types of liens—so-called judicial liens and non-possessory, nonpurchase money liens.[61] Even the latter types of liens were to be avoided only in specified property.

The reasons for adopting these lien avoidance provisions was described most explicitly in the House Report.

> [*T*]*he bill gives the debtor certain rights not available under current law with respect to exempt property.* The debtor may void any judicial lien on exempt property, and any nonpurchase money security interest in certain exempt property such as household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy . . . . The [second] exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods.[62]

Both the Senate and the House Reports made clear, however, that the "rule of *Long v. Bullard*, 117 U.S. 617 (1886), is accepted with respect to the enforcement of *valid* liens . . . on exempt property."[63] The effect, there-

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[61] Thus, for example, purchase money liens may not be avoided under section 522(f). *See In re Hall*, 752 F.2d at 586 n.5. Other types of liens are, of course, avoided by other sections of the Code but for different reasons.

[62] H.R. Rep. No. 595, 95th Cong., 1st Sess., at 126-27 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6087-88 (footnotes omitted and emphasis supplied). As to the first right, the House Committee believed that the exemption should be preserved even if "a creditor beats the debtor into court" and as to the second it concluded that "over-reaching creditors" should not have an "unfair advantage." *Id.*

[63] H.R. Rep. No. 595, 95th Cong., 1st Sess., at 361 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6317; S. Rep. No. 989, 95th Cong., 2nd Sess., at 76 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5862 (emphasis sup-

fore, of sections 522(c) and (f) was to continue to preserve, as a matter of federal policy, purchase money and certain other types of liens on exempt property, but to reduce the federal role by allowing state and federal exemptions to eliminate the liens specified in section 522(f).[64]

C. Section 522(f) Was Not Designed To Avoid Liens Preserved by State Law.

While not disputing that section 522(b) makes the exemption in this case entirely dependent on state law,[65] petitioner urges that the policy of section 522(f) would somehow be frustrated if the states were permitted under section 522(b) to define their exemptions to preserve state-created liens, stating

> It is not reasonable to conclude that Congress provided lien avoidance remedies which affected, primarily, encumbrances arising by virtue of state law and, at the same time, "impliedly" relinquished to the states the power to evade that federal remedy through the means of exemption 'exceptions.'[66]

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plied). *See also* 3 *Collier on Bankruptcy*, ¶ 522.04, at 522-17 (15th ed. 1989) ("the discharge will not prevent the enforcement of valid liens—even on exempt property").

[64] For example, the Bankruptcy Commission bill described its equivalent of section 522(f) as "avoid[ing] one of the means by which the policy of § 6 of the Act [adopting state exemptions] was frustrated." *Commission Report* at 130. *See also Bankruptcy Reform Act of 1978: Hearings on H.R. 31 and 32 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 94th Cong., 2d Sess., at 979 (1976) (statement of Bernard Shapiro, National Bankruptcy Conference) (exemptions "are also valueless if a creditor has a security interest in exempt property").

[65] *See* Br. at 30.

[66] Br. at 33. As noted below, some courts of appeals have agreed. *In re Snow*, 899 F.2d 337 (4th Cir. 1990) (holding that lien for rent may be avoided under section 522(f) even though Virginia statute excepted liens for rent from homestead exemption); *In re Leonard*, 866 F.2d 335, 336 (10th Cir. 1989) (avoiding lien on household goods, even though Colorado provision limited exemption for household goods to the extent of $1,500 in "value" and defined "value" as the difference between the fair market value and the amount of the lien).

This argument is not sustainable:[67]

First, it appears that the entire purpose of section 522(f), in conjunction with 522(c), was to partially overrule this Court's decision in *Long v. Bullard*. *Long v. Bullard* represented a federal impediment to the effectuation of state exemption policy. Congress' desire to partially overrule that decision and thus to limit the federal role in the exemption process hardly suggests that Congress intended to take the additional step of refusing to permit the states to exercise their traditional power of defining the scope of their exemptions.[68]

Second, it is quite clear that Congress did not intend to restrict state power. Section 522(b) on its face does

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[67] In addition to the present case, the issue has come up primarily in cases under section 522(f)(2) involving liens on household goods, *e.g.*, *In re Pine*, 717 F.2d 281, 283 (6th Cir. 1983) (analyzing Georgia and Tennessee statutes which exempted respectively, the "debtor's interest" and the "debtor's equity interest" in certain household goods and thus, according to the court, limited the debtor's exempt property to the "interest in property which is owned by [the debtor] and unencumbered by third party liens"), *cert. denied*, 466 U.S. 928 (1984); *In re Leonard*, 866 F.2d at 336 (Colorado created exemption for household goods to the extent of $1,500 in value; "value" defined as the difference between the fair market value and the amount of the lien); *In re McManus*, 681 F.2d 353, 356 (5th Cir. 1982) (Louisiana R.S. 13:3885, which provided that household goods subject to a chattel mortgage were not exempt). One case decided under section 522(f)(1) involved a Virginia provision which preserved judicial liens "[f]or rent." *In re Snow*, 899 F.2d at 339.

[68] It is significant that not one of the court of appeals' decisions finding that section 522(f) overrode state exemption policy discussed either this Court's decision in *Long v. Bullard* or the fact that section 522(f) was designed to partially overrule that decision to make the exemptions effective.

not limit the states' discretion to define exemptions.[69] Rather section 522(b) allows a debtor to exempt from property of the estate "any property that is exempt under State or local law." Section 522(b) does not require the states to exempt any particular kinds of property. Congress and the courts have repeatedly recognized the power of the states to fashion their exemptions as they choose. Thus it is clear that the states may place a dollar limit on particular exemptions;[70] may deny the exemptions to the debtor who engages in fraudulent conduct;[71] and may refuse to adopt any exemption for a particular kind of property.[72] Thus, a state seeking to preserve judi-

[69] Petitioner argues that "the phrase, '. . . would have been entitled under sub-section (b) . . .' [appearing in section 522(f)] supports the contention that (f) was meant to apply in situations where enjoyment or assertion of an exemption was prevented by an encumbrance of the type described in (f)(1) and (f)(2)." Br. at 24-25. The use of the word "would" rather than "is" in section 522(f) hardly suggests that Congress intended to override state policy defining exempt property. The use of the word "would" reflected the fact that exempt property that is encumbered by a lien would remain encumbered under the rule of *Long v. Bullard* absent avoidance of the lien. Section 522(f) thus permits avoidance of a lien "to the extent that such lien impairs any exemption to which the debtor would have been entitled under subsection (b)." 11 U.S.C. § 522(f). It does not, however, permit avoidance of a lien where the lien impairs no exemption to which the debtor "would" have been entitled under state law.

[70] Addressing these dollar value limits, the House and Senate committee reports indicate that one important purpose of section 522(f) was to avoid a judicial lien "to the extent that the property could have been exempted in the absence of the lien." H.R. Rep. No. 595, 95th Cong., 1st Sess., at 362 (1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6318; S. Rep. No. 989, 95th Cong., 2d Sess., at 76 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5862.

[71] *See* 3 *Collier on Bankruptcy*, ¶ 522.08 (15th ed. 1989).

[72] The earlier decision of the Eleventh Circuit in *In re Hall*, while rejecting the suggested construction of 522(f), noted that "[i]n granting the states the power to opt out of the federal list

cial liens against homestead property could do so without offending the Bankruptcy Code by providing no exemption for such property.

Petitioner cites no legislative history suggesting that section 522(f) had any purpose to limit state power to define exemptions.[73] In view of the states' virtually unlimited power to define exemptions where liens are not implicated, it is difficult to see what federal policy would be undermined if the state statute is permitted to limit the exemption to property not subject to liens. Dean Thomas Jackson, a leading expert in the field of bankruptcy law, has agreed: "In a regime where nonbankruptcy law determines what is exempt and when the special categories are nonconsensual instead of consensual, there is little reason for bankruptcy law to override that state balance."[74] It is particularly difficult to believe that the federal government would have the slightest interest in defeating such a limitation on the state homestead exemption in view of the narrow scope of the alternative federal homestead exemption[75] and the fact

of exemptions, Congress did not appear to place any limit on the states' ability to do so." 752 F.2d at 587 (footnote omitted). *See also In re Bland*, 793 F.2d at 1176 (Hill, J., concurring dubitante) ("Georgia could, if it wished, provide for no exemption at all on personal, family and household goods. That would not override the provisions of section 522(f).").

[73] An earlier decision of the Eleventh Circuit purportedly found significance in the presence of a lien avoidance provision in the Senate bill at a time when that same bill provided only for state (and federal non-bankruptcy) exemptions. *In re Hall*, 752 F.2d at 587. The theory there apparently was that section 522(f) must have been designed to negate a state decision to exclude the lien from the exemption since no federal bankruptcy exemptions were included in the Senate version of the bill. As noted below, pp. 26-27, section 522(f) serves important purposes quite apart from the federal exemption provisions contained in section 522(d).

[74] T. Jackson, *The Logic and Limits of Bankruptcy Law*, 266.

[75] Section 522(d)(1) provides a homestead exemption "not to exceed $7,500 in value." The initial House bill, H.R. 8200, pro-

that Section 522(f)(2), dealing with non-possessory non-purchase money liens, does not even apply to avoid liens on residences.

Finally, contrary to petitioner's view[76] and the suggestion of the Tenth Circuit,[77] section 522(f) would not be rendered meaningless if it were construed to give deference to the state definition of the scope of the exemptions. As we have discussed, in view of this Court's decision in *Long v. Bullard*, section 522(f) was essential to ensure that state policy reflected in the exemption statute would be effectuated by the avoidance of liens. The domiciliary state law in and of itself would often not provide a mechanism for avoiding such liens. For example, many state exemption statutes provide only that the property will be exempt in bankruptcy cases and do not prevent the fixing of liens in such property in the first instance.[78] Avoidance of liens created in a non-

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vided a homestead exemption not to exceed $10,000 in value, while, as described above, the initial Senate bill, S. 2266, provided no federal homestead exemption. As part of the compromise, the dollar amount in section 522(d)(1) was lowered.

[76] Br. at 31.

[77] *See In re Leonard*, 866 F.2d at 337 ("[a]ny other reading of § 522(f) would make the language meaningless and would lead to an absurd result").

The earlier Eleventh Circuit decision in *In re Hall* also stated that that failure to invalidate state liens "would render the statute useless, a result inconsistent with the well-established principle of statutory construction requiring that all parts of an act be given effect, if at all possible." 752 F.2d at 586.

[78] *E.g.*, Ark. Code Ann. § 16-66-218(a) (Supp. 1987) ("[t]he following property shall be exempt from execution under bankruptcy proceedings . . ."); Ga. Code Ann. § 44-13-100 (Supp. 1988) ("any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property . . ."); Ky. Rev. Stat. Ann. § 427.160 (Michie Supp. 1989) ("[i]n addition to other exemptions provided in this chapter every debtor shall have a general exemption not to exceed one thousand dollars ($1,000) in value to be applied toward any property, real or personal, tangible or intangible in his estate when he has filed for

domiciliary state was also essential if the domiciliary state's choice was to be preserved.[79] Moreover, as many commentators have pointed out, a primary purpose of 522(f) appears to be to preserve the federal bankruptcy exemptions appearing in section 522(d) of the Bankruptcy Code.[80] Indeed, section 522(f) seems to a significant extent to be specifically designed to preserve certain of the federal exemptions.[81] Section 522 is also necessary to avoid liens impairing exemptions created by federal non-bankruptcy law.[82]

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bankruptcy under the provisions of the Bankruptcy Code of 1978 . . ."). In some cases, of course, a judicial lien would not exist in the state creating the exemption since the exemption would itself bar the fixing of a judicial lien. *E.g.*, Tex. Const. art. 16, § 50 ("[n]o mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon . . .").

[79] *See* 3 *Collier on Bankruptcy*, ¶ 522.06, at 522-28 (15th ed. 1989).

[80] *See, e.g.*, T. Jackson, *The Logic and Limits of Bankruptcy Law*, 264 ("In part, this section is necessary because of the bankruptcy exemptions of section 522(d). These kinds of property are protected by bankruptcy law itself and may have picked up liens or security interests outside of bankruptcy, where they may not have been considered exempt."); R. Jordan & W. Warren, *Bankruptcy*, 67 (2d ed. 1989) ("[s]ince § 522(d) provides a federal schedule of exemptions, the lien may relate to property that the debtor can exempt in bankruptcy even though that property may have been nonexempt under the state law"); 1 W. Norton, *Norton Bankruptcy Law and Practice* § 26.41 (1981) (section 522(f)(1) "has particular application to permitting avoidance of judicial liens on property that is exempt under the federal alternative exemption scheme though not exempt under state law") (footnote omitted).

[81] This design is suggested by the "similarity in phrasing between the items protected by § 522(f)(2) and the items listed in § 522(d)(3), (4), (6) and (9)." *See* T. Eisenberg, *Bankruptcy and Debtor-Creditor Law*, 493 (2d ed. 1988).

[82] *See* note 50 *supra* for a partial list of such exemptions. Under section 522(b), states which have opted out of section 522(d) and thereby precluded debtors from claiming exemptions listed in that

In short, the primary purpose of section 522(f) was to reduce the role of federal bankruptcy law in preserving security interests and thus to prevent "impair-[ment]" of the exemptions created by state or federal law. Its purpose was not to expand the scope of state exemptions by avoiding liens that the states acted to preserve. The courts of appeals in this case and in the Fifth and Sixth Circuits have correctly held that states can preclude the avoidance of liens under section 522(f) by defining encumbered property to be non-exempt to the extent of the encumbrance.[83]

II. CONGRESS DID NOT INTEND TO PRECLUDE THE STATES FROM ENACTING EXEMPTION PROVISIONS WHICH OPERATE PROSPECTIVELY ONLY.

Even if section 522(f) were to be construed generally to override state laws defining the scope of the exemptions to exclude encumbered property, that section would not permit avoidance of the lien in this case because that lien arose before the exemption became effective. There is not the slightest indication that Congress intended to require retroactive application of a state exemption provision, such as the Florida provision, where under state law the provision operates prospectively only.

Article 10, section 4(a)(1) of the Florida Constitution by its terms precludes the attachment of new judicial liens to exempt homestead property, and the courts of that state have held that liens based on judgments filed

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section cannot prevent debtors from claiming exemptions available under federal laws other than the Bankruptcy Code. That is because a debtor may still exempt "any property that is exempt under Federal law, other than subsection (d) of this section" in addition to property that is exempt under "State or local law." 11 U.S.C. § 522(b)(2)(A).

[83] *In re Pine*, 717 F.2d at 283-284; *In re McManus*, 681 F.2d 353 (5th Cir. 1982).

after the property qualified for the exemption do not attach to the exempt property.[84] When Florida amended the constitution to extend the homestead exemption to all "natural person[s]," however, it acted prospectively.[85] Thus, a judicial lien on property which otherwise qualifies for the homestead exemption remains enforceable under Florida law where, as here, it attached before the effective date of the amendment.[86]

This Court has long recognized the presumption that legislation is to be applied only prospectively unless Congress specifies otherwise.[87] As the Court noted in *Bowen v. Georgetown University Hospital*, "congressional enactments and administrative rules will not be construed to

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[84] *See Aetna Insurance Co. v. LaGasse*, 223 So. 2d at 729 (priority given to homestead right if homestead right and lien attach simultaneously); *Bowers v. Mozingo*, 399 So. 2d 492, 494 (Fla. App. 1981) (same); *Volpitta v. Fields*, 369 So. 2d 367, 369 (Fla. App.) ("no judgment can be a lien upon homestead property if the property acquired homestead exempted status prior to the existence of the judgment lien"), *cert. denied*, 379 So. 2d 204 (Fla. 1979); *Clements v. Henderson*, 70 Fla. 260, 70 So. 439 (1915) (per curiam) (permitting a homesteader to quiet title as against judgment lien).

[85] *See* cases cited at note 18 *supra*.

[86] *See* note 18 *supra*.

[87] *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982) ("[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"); *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935) ("a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears"); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928); *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) ("[w]ords in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied").

have retroactive effect unless their language requires this result." [88] The rule has been repeatedly recognized in the bankruptcy context.[89] This Court has specifically held that this principle of construction applies to section 522(f) of the Bankruptcy Code. In *United States v. Security Industrial Bank*, the Court held that section 522(f), in a case involving the federal bankruptcy exemptions in section 522(d), should not be applied to liens arising before its date of enactment because:

> [n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress.[90]

While the present retroactivity issue arises in a slightly different context, the retroactivity question presented

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[88] 488 U.S. 204, 207 (1988). In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, this Court noted, but did not reconcile, the "apparent tension" between that rule and two recent cases saying that a "statute that went into effect during the pendency of [an] appeal was to be applied by the appellate court," 110 S. Ct. 1570, 1576, 1577 (1990) (referring to *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974) and *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 282 (1969)). The Court need not resolve this tension here, because the presumption applied in *Bradley* and *Thorpe* has been limited to "cases in which the statute has been enacted after initial adjudication," *Kaiser*, 110 S. Ct. at 1586 (Scalia, J., concurring) and is subject to an "exception" where retroactive application " 'would infringe upon or deprive a person of a right that had matured or became unconditional,' " *id.* at 1585 (Scalia, J., concurring), *quoting Bradley*, 416 U.S. at 720. In this case, the Florida amendment became effective long before the commencement of this case or any appeal, and this is also a case where retroactive application would destroy respondent's lien "that had matured" before the Florida amendment became effective.

[89] *Holt v. Henley*, 232 U.S. 637, 639 (1914) ("the reasonable and usual interpretation of [bankruptcy] statutes is to confine their effect, so far as may be, to property rights established after they were passed").

[90] 459 U.S. at 81-82.

here is in principle the same as that involved in *Security Industrial Bank*, for it is not state law here that creates the retroactivity problem, but federal law. Just as section 522(f) was construed in *Security Industrial Bank* not to have retroactive application, so here it should not be construed as requiring that state policy be retroactively applied. *Kener v. La Grange Mills*, 231 U.S. 215 (1913).[91] In view of the well-established federal policy against retroactive lien avoidance, it would be odd indeed to find that Congress intended the federal Bankruptcy Code to require that state exemption statutes be given retroactive effect, particularly when the state itself deliberately chose to make the exemption provisions prospective only.

Neither the Bankruptcy Code nor its legislative history manifests a Congressional purpose to require that state exemption provisions be given retroactive effect. Even far more specific language has been found insufficient to mandate retroactive operation of state exemption law.[92] Just as in *Security Industrial Bank*, where section 522(f) was construed not to operate retroactively, section 522's silence cannot constitute the "clear, strong and im-

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[91] In *Kener*, this Court held that federal bankruptcy law cannot constitutionally require retroactive application of state exemptions to invalidate pre-existing liens. The Court's decision rested independently on principles of statutory construction. *Id.* at 218. Here, as in *Security Industrial Bank*, the existence of constitutional doubts supports a limiting construction.

[92] The Bankruptcy Act of 1867 provided for certain uniform federal exemptions, plus exemptions as were available under other federal laws and the laws of the debtor's domicile in force in 1864. 14 Stat. 523 (1867). In 1872, Congress amended the statute to permit debtors to claim exemptions available under state exemption laws in force in 1871. 17 Stat. 334, chap. 339 (1872). After at least one court held that Congress had not intended to incorporate state exemption laws to the extent those laws operated retrospectively to impair prior debts, *In re Wyllie*, 30 Fed. Cas. 733 (No. 18,112) (W.D. Va. 1872), Congress stated in an 1873 amendment that state exemption provisions were to operate retroactively. The

perative" expression of intent necessary to require state exemption provisions such as Florida's to operate retroactively.[93]

1873 Amendment provided that "it was the true intent and meaning" of the 1872 amendment:

> that the exemptions allowed the bankrupt by the amendatory act should, and it is hereby enacted that they shall, be the amount allowed by the constitution and laws of each State [in force in 1871] and that such exemptions be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree, of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding.

17 Stat. 577, chap. 235 (1873). As noted above, note 91 *supra*, this Court refused to give effect even to the 1873 amendment in *Kener v. La Grange Mills*, 231 U.S. 215 (1913).

[93] *United States v. Heth*, 7 U.S. (3 Cranch) at 413. We recognize that this Court in *Security Industrial Bank* did not resolve the question of whether section 522(f) could be applied to avoid liens created during the "gap period" between enactment of the statute and its effective date, 459 U.S. at 82 n.11; that at least one court of appeals after *Security Industrial Bank* has held that section 522(f) avoids liens arising during the gap period, *In re Ashe*, 712 F.2d 864 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *Cf. In re Webber*, 674 F.2d 796 (9th Cir.), *cert. denied*, 459 U.S. 1086 (1982) (decided before *Security Industrial Bank*; and that the lien in question here arose between the enactment and effective date of the Florida constitutional provision. However, we suggest that *In re Ashe* was incorrectly decided. The entire purpose of having a separate effective date is to avoid application of the statute upon its enactment date. *See United States v. Estate of Donnelly*, 397 U.S. 286, 294 (1970) ("[a]cts of Congress are generally to be applied uniformly throughout the country *from the date of their effectiveness onward*") (emphasis supplied); *Kaiser*, 110 S. Ct. at 1578 (amendment to federal postjudgment interest statute, 28 U.S.C. § 1961, did not govern interest rate on judgment predating amendment's effective date; "Congress delayed the effective date on the amended version cannot be applied before the effective date of 1982"). prepare for the change in the law. . . . Thus, at the very least, the amended version cannot be applied before the effective dat of 1982"). In any event, the theory of *In re Ashe* has no application here. First, in concluding that section 522(f) could be applied during the gap period between the passage and effective date of the Code, *Ashe* rested on Congressional intent. *In re Ashe*, 712 F.2d at 868. By contrast, there is no reason to believe that Congress intended to override a state exemption provision to the extent it did not apply retroactively. *Kener v. La Grange Mills*, 231 U.S. 215 (1913). The decision in *Ashe* also rested on the fact that notice existed of the effect of the Code upon its enactment. *In re Ashe*, 712 F.2d at 868 (creditors acquiring liens during the gap period had notice of the future effect of the Code). Whether or not Congress provided effective warning of the possibility of lien avoidance in connection with the alternative list of federal exemptions, no such notice existed here. Florida advised potential security holders that liens arising before the effective date of the new constitutional provision would be preserved.

Because there is no indication in either the language of section 522 or the legislative history that Congress intended to require retroactive operation of state exemption provisions, section 522(f) should not be construed to override Florida's decision to have the exemption operate prospectively only, and respondent's lien should be preserved.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 10, 1990

FOR ARGUMENT

(6)

No. 89-1008

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

DWIGHT H. OWEN

Petitioner

vs

HELEN OWEN

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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SUMMARY OF ARGUMENT

I. The Respondent/Creditor suggests that a state may limit its homestead exemption so as to preserve a judicial lien despite 11 USC 522(f)(1). The Petitioner/Debtor argues that such a position can not be sustained consistent with the language and legislative history of the Code. The construction placed upon that Code provision by the Creditor is contrary to appropriate principals of statutory interpretation.

II. The Respondent/Creditor also argues that the reasoning of United States v Security Industrial Bank 459 US 70 (1982) should be applied to this case and that lien avoidance would produce improper retroactive application of law. The Petitioner/Debtor argues that the issue of retroactivity does not arise and that factual differences between the instant

case and United States v Security Industrial Bank, above, render that case inapplicable to the issues and interests involved here.

ARGUMENT

The Respondent poses two questions in the answer brief for the Respondent.

1. WHETHER, UNDER SECTION 522 OF THE BANKRUPTCY CODE - WHICH AUTHORIZES THE STATES TO ESTABLISH CATEGORIES OF EXEMPT PROPERTY FOR PURPOSES OF BANKRUPTCY - A STATE MAY LIMIT ITS HOMESTEAD EXEMPTION SO AS TO PRESERVE A JUDICIAL LIEN.

The Debtor in this case is accorded only the exemptions provided by Florida law[1]. Florida did not alter its exemption provisions in response to the enactment of the Code and did not create any separate class of exemptions for bankruptcy purposes[2]. By virtue of the amended homestead exemption which became effective

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1. Chapter 222.20, Florida Statutes. (JA 16).

2. Id.

on 8 January 1985, the Debtor was entitled to that exemption when his Chapter 7 petition was filed on 13 January 1986 and the Bankruptcy court so determined[3]. The Creditor's judgment lien, which attached to the Debtor's property prior to the entitlement to the exemption remains, under Florida law, enforceable against the homestead right which the Debtor subsequently achieved[4]. Such an exemption limitation is not objectionable solely as a matter of state law and the Code does not purport to upset this as state policy[5]: This is not to say that those

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3. See In Re Owen, Order on Objection to Claim of Exempt Property, United States Bankruptcy Court, Middle District of Florida, Tampa Division, Case No. 86-106, at p. 3-4, August 13, 1986.(JA1). In Re Zahn, 605 F 2d 323 (7th Cir 1979) cert den 444 US 1075 (1980).

4. B. A. Lott, Inc. v Padgett, 14 So 2d 667 (Fla 1943).

5. 11 USC 522(b)(2)(A).

state exemptions are immune from other provisions of the Code. The Creditor contends that this particular state law limitation or "exemption exception" must also be effective to preclude operation of 11 USC 522(f)(1).[6]

The inquiry, however, does not end with a mere determination of state exemption law. Once the Debtor has invoked the provisions of the bankruptcy laws by filing his petition, an independent body of Federal law must be applied. Creditor

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6. R. Br. at 22-25. This is the issue about which the circuits have disagreed. In Re Pine, 717 F 2d 281 (6th Cir 1983) cert den 466 US 928 (1984) and In Re McManus, 681 F 2d 353 (5th Cir 1982) have adopted the view that state law may limit lien avoidance under 11 USC 522(f)(1) in this way. In Re Hall, 752 F 2d 582 (11th Cir 1985), In Re Leonard, 866 F 2d 335 (10th Cir 1989) and In Re Snow, 899 F 2d 337 (4th Cir 1990) have taken the view that state law definitions remain subject to an independent application of 11 USC 522(f). A number of Courts have expressly recognized this conflict, including In Re Bessent, 831 F 2d 82 (5th Cir 1987), In Re Pelter, 64 BR 492 (Bankr WD Okla 1986), Dominion Bank of the Cumberlands NA v Nuckolls, 780 F 2d 408 (4th Cir 1985)(concurring opinion).

essentially contends that state lien preservation is effective to deprive this Debtor of lien avoidance under the Code.[7] This view of the balance of state and Federal law can not be supported, for various reasons, and should not be adopted by this Court.

First, the plain language of the Code does not support the contention that the power of the state to define exemptions includes the power to preclude operation of 11 USC 522(f).[8] There exists no "state option" under subsection (f).[9] Similarly,

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7. R. Br. at 22-28. This is the view taken by the 5th and 6th Circuits. This was also the view taken by the Court of Appeals below at 877 F 2d 44, 47 (A8).

8. Various courts have found lien avoidance to be available on this basis. See In Re Hall, above, In Re Storer, 13 BR 1 (Bankr SD Ohio 1980), and In Re Taylor, 73 BR 149 (9th Cir BAP 1987) affirmed 861 F 2d 550 (9th Cir 1988).

9. See In Re Jackson, 55 BR 343 (Bankr MD NC 1985), In Re Wilson, 51 BR 16 (Bankr SD Ind 1984), In Re Barto, 8 BR 145 (Bankr ED VA 1981), and In Re Pelter, above.

the reference to judicial lien found in subsection (f) is unqualified and unconditioned.[10] For this Court to sustain the Creditor's position, this Court would be required to broaden state authority under 11 USC 522(b) and narrow the role of 11 USC 522(f). The language of neither supports such a result and it would not be within the proper role of this Court to permit it.[11]

Second, like the code provisions, the legislative history offers no support

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10. Lien avoidance has been permitted where, by state law, the lien acquired priority over the exemption. See In Re Lawery, 57 BR 104 (Bankr MD Ala 1985), In Re Baxter, 19 BR 674 (9th Cir BAP 1982), In Re Dahdah, 20 BR 665 (9th Cir BAP 1982), In Re Hershey, 50 BR 329 (DC SD Fla 1985).

11. As a principal of Statutory construction, it is inappropriate for this Court to imply terms or conditions which Congress did not include in the statute. See Fedorenko v United States, 449 US 490, 513 (1981) ("We are not at liberty to imply a condition which is opposed to the explicit terms of the statute..."), United States v Cooper Corporation et al, 312 US 600, 605 (1940) ("But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made.").

for the restrictions on subsection (f) suggested by the Creditor.[12] To the contrary, the reference to judicial liens quite clearly indicate that the limitations suggested by the Creditor were not intended.

Third, Florida's "opt out" provision

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12. Quoting in part from In Re Snow, 899 F 2d at 339, the following appears
"Both the House and Senate versions of the bill that became the lien avoidance section, §522(f), allow liens to be avoided, 'to the extent the property could have been exempted in the absence of the lien...' H.R. Rep. No. 595, 95th Cong. 1st Sess. 362 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6318; S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5862. The legislative history illustrates the concern which the law was designed to address by stating:
'The bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property, and any nonpurchase money security interest in certain exempt property such as household goods..."(Omissions suppied). H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 127 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6087-88.
See also Garcia v United States, 469 US 70,75 (1984)

refers only to subsection (d) regarding exemptions.[13] It does not refer to subsection (f) and thus does not attempt to limit or avoid that section.[14]

Fourth, the validation of state authority to evade 11 USC 522(f) by way of exemption exceptions would render that section inoperative at the election of a state legislature.[15] However, it would

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12(cont.) (legislative history must make an extraordinary showing of contrary intention to justify limitation on the plain meaning of the statutory language). The Creditor in this case has made no such showing.

13. Chapter 222.20, Florida Statutes. (JA16).

14. Since there is no indication that Florida has attempted to "opt out" of subsection (f), this Court need not determine whether it would be permissable to do so. Like here, the Court in In Re Bland, 793 F 2d 1172 (11th Cir 1986), declined to find that Georgia had done so and upheld the ruling of In Re Hall, above.

15. A number of courts have recognized that such a result would occur where exemption "exceptions" preclude operation of 11 USC 522(f). See In Re Hall, above, In Re Leonard, above, In Re Pelter, above.

be inappropriate for this Court to authorize such a result inasmuch as it must be assumed that Congress intended that subsection (f) be effective.[16] This Court must construe all provisions of an act to be of effect if at all possible.[17]

Fifth, the Creditor's interpretation of the scope of permissible state exemption definitions has created, in the view of a number of lower courts, a violation of the federal supremacy clause.[18] This issue

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16. See Colauti v Franklin, 439 US 379, 392 (1979) (a statute should not be interpreted so as to render a part inoperative).

17. See United States v Menasche, 348 US 528, 538-539 (1955) (" It is our duty 'to give effect, if possible, to every clause and word of a statute,' (cite omitted), rather that to emasculate an entire section,...").

18. Some courts have cited this violation without detailed analysis. In Re Maddox, 713 F 2d 1526 (11th Cir 1983), In Re Hershey, above. Others have analyzed the issue more fully. In Re Pelter, above, and In Re Storer, above. It appears that this issue need not be addressed and that an independent application of 11 USC 522(f) would resolve the problem as a matter of construction.

arises, as here, where state law deprives the debtor of his exemption by reason of the existence of the judicial lien.[19] Thus, it is said, there is no impairment because there is no exemption.[20] Federal law, on the other hand, provides that a judicial lien which impairs an otherwise

19. Like the opinion in Owen, below, this approach has been approved in In Re Pine, above, and In Re McManus, above.

20. In In Re Owen, 877 F 2d at 47. It appears from the cases, however, that this is an incomplete expression of Florida law. Florida does not deprive a debtor of all right to claim the homestead exemption merely because a lien attached while the property was ineligible for the exemption. See Lamb v Ralston Purina Company, 21 So 2d 127 (Fla 1945), Bessemer v Gersten, 381 So 2d 1344 (Fla 1980). Florida law merely affords such a creditor with a continued remedy against otherwise exempt property if a creditor's lien attached prior to the availability of the exemption.

The remedy afforded a creditor whose lien attaches prior to the homestead right is a product of decisional law, see Pasco v Harley, 75 So 30 (Fla 1917), and does not derive from the language of the Florida Constitution. Art X, Sec. 4, Florida Constitution. (JA13).

available exemption may be avoided.[21] Therefore, if a state law exception for judicial liens is effective, in bankruptcy, a direct conflict with 11 USC 522(f) arises because the provisions can not both be effective. Application of one defeats application of the other. A judicial lien can not be both an impairment to an exemption and an "exception" to the exemption. Resolution of such a conflict in favor of the application of state law is, here, inconsistent with the requirements of the Supremacy Clause.[22] In addition,

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21. 11 USC 522(f)(1).

22. Article VI, Clause 2, provides that state law may not be given effect where to do so would defeat the federal provision. See Hines v Davidowitz, 312 US 52 (1941), see also Exxon Corporation v Eagerton, 462 US 176 (1983) (finding state law pre-emption to occur where compliance with both the state and federal provision was not possible and where state law stood as a obstacle to accomplishment of the full purposes and objectives of Congress).

Here, the lower courts sustained the state created exception for the judgment lien, thereby rendering the federal provision inoperative.

assuming, as we must, that Congress intended subsection (f) to have some effect, allowing state law to prevail would defeat the purposes expressed therein.[23]

Sixth, subsection (f) contains no requirements or inhibitions concerning state exemption laws and those laws remain unaffected by that section outside the context of bankruptcy. Within the context of bankruptcy, subsection (f) provides, for the benefit of debtors, certain limited remedies respecting property which would otherwise be exempt.[24] States are free, at any time, to limit a debtor's exemptions by such means as they choose, other than those which would conflict with 11 USC 522(f).[25]

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23. See Exxon Corporation v Eagerton, above

24. Lien avoidance is a new remedy for debtors under the bankruptcy laws. See note 12, above,

25. See In Re Sullivan, 680 F 2d 1131 (7th Cir 1982) cert den 459 US 992 (1983) (upholding state laws providing less exemptions than Federal law).

The Creditor urges that a state law which preserves judicial liens on otherwise exempt property should be observed and protected through bankruptcy. This position has received little support. It would be inconsistent with the Code and its legislative history if that position were sustained. Affirmance of the decision below can not be done without doing violence to the principles of construction which this Court traditionally observes.[26]

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26. See note 11, above.

II. WHETHER SECTION 522(f) OF THE BANKRUPTCY CODE, WHICH PROVIDES FOR AVOIDANCE OF CERTAIN LIENS ON EXEMPT PROPERTY, WAS INTENDED TO REQUIRE RETROACTIVE APPLICATION OF A STATE EXEMPTION STATUTE TO INVALIDATE A PRE-EXISTING JUDICIAL LIEN.

In furtherance of this contention, the Creditor attempts to analogize or apply this Court's decision in United States v Security Industrial Bank, 459 US 70 (1982).[1] The holding in that case was essentially limited to the conclusion that Congress did not intend that the provisions of 11 USC 522(f)(2), which applies to consensual liens, be applied to liens on specific property created prior to the effective date of the Code.[28]

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27. R. Br. at 30.

28. 459 US at 81-82.

The above holding, then, concludes nothing about the present case. Inasmuch as the Creditor here had no lien until the date the Debtor acquired the property on 27 November 1984, the Code does not receive a retroactive application. Similarly, no 5th Amendment problem arises as there was no pre-existing property right in specific property.[29]

29. In Conard v The Atlantic Insurance Company of New York, 26 US(1 Pet) 386, 442-443 (1828), this Court, in construing Pennsylvania lien law, stated

> "...it is not understood that a general lien by judgment on land, constitutes, per se, a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to the judgment....But subject to this the debtor has full power to sell or otherwise dispose of the land. His title to it is not devested or transferred by the judgment to the judgment creditor....In short, a judgment creditor has not jus in re, but a mere power to make his general lien effectual by following up the steps of the law, and consummating his judgment by an execution and levy on the land."

With respect to judgment liens, Florida has adopted the rule set forth above. In Massey v (cont.)

The thrust of Creditor's argument, or analogy, suggests an application of the United States v Security Industrial Bank to state law. This reasoning fails for similar reasons. State law, both before and after the 6 November 1984 constitutional amendment, provided the Creditor with the same remedy against the property.

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29 (Cont.) Pineapple Orange Company 100 So 170 172 (Fla 1924) where the court states

> "A general lien by judgment on land only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment. A judgment creditor has no jus in re, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and levy on the land."

See also Gilpen v Bower, 12 So 2d 884 (Fla 1943) wherein the court distinguishes mortgages and judgment liens and concludes that a judgment lien was not a claim upon specific property. See also Nassau Realty Company Inc v City of Jacksonville, 198 So 581, 582 (Fla 1940) (distinguishing judgment liens and liens on specific property); Young v McKenzie, 46 So 2d 184,185 (Fla 1950) (following Massey, above.)

The lien rights were not altered or diminished by virtue of the amendment.[30] Since state law does not provide to the Debtor a lien avoidance remedy, the Creditor's lien is defeated, if at all, only by application of 11 USC 522(f). As a result, neither body of law receives retroactive application.[31]

The retroactivity argument only arises where one overlooks the manner, and point in time, that exemption rights are to be determined. For bankruptcy purposes, that

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30. Article X, Section 4, Florida Constitution (JA13)

31. The Holt v Henley, 232 US 637 (1914) rule, cited at R. Br. p. 30, is not called into play as no pre-code rights are in issue.

Because, under Florida law, the judgment lien creates no interest or estate in specific property, the lien provides the lien holder a remedy only. See note 29, above. Because a property or liberty interest must exist before any due process analysis is warranted, see Perry v Sinderman, 408 US 593 (1972), and the Creditor's lien in this case creates a remedy only, there should be no occasion to conclude that the 5th amendment concerns expressed in United States v Security Industrial Bank, above, would apply.

See also In Re Hinson, 20 BR 753, 757-758 (Bankr D Sc 1982) (construing judgment lien law).

focal point is the date of the filing of petition.[32] On the date of the filing of Debtor's Chapter 7 case, Florida law accorded him his homestead exemption.[33] The Creditor's lien, even though enforceable, could not have barred his right to that exemption because that right was not dependent upon the non-existence of a pre-existing lien such as was involved here.[34] At the time of the filing of the petition the Creditor's lien, under state law, remained as much a remedy as it was on 27 November 1984.

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32. White v Stump, 266 US 310,313 (1924) ("When the law speaks of property which is exempt and of rights to exemptions, it, of course refers to some point of time....The provisions before cited show - some expressly and others impliedly - that one common point of time is intended, and that is the date of the filing of the petition."); In Re Zahn, above.

33. Article XI, Section 5, Florida Constitution. (JA15). See note 3, above.

34. See note 20, above.

Since the Code preceded, by some five years, the Creditor's acquisition of the lien, that lien was acquired with the knowledge of the Code provisions.[35] The Creditor never acquired any vested right to any particular interpretation of the Code provisions, either before or after the acquisition of that lien, and the Code never provided assurances that some future lien would be forever immune from the operation of 11 USC 522(f). Furthermore, an interpretation of subsection (f) which would void a judgment lien such as this one was all the more apparent because state law, whether pre-amendment or post-amendment, never provided that a judgment lien could bar, for all purposes, the

35. See In Re Webber, 674 F 2d 796 (9th Cir 1982) cert den 459 US 1086 (1982) where the court considered consensual liens obtained in the "gap" period following enactment of the Code. There it was concluded that it was not unreasonable to impute knowledge and understanding of the Code to creditors and therefore the court found certain "gap" period security interests to be avoidable.

acquisition of the homestead.[36] Thus, the Creditor knew, prior to acquisition of any lien, that a federal mechanism was in place which provided for avoidance of certain liens and the Creditor also knew that, because of the nature of the Florida homestead exemption, she could, at best, be afforded a remedy against that homestead but could not, by virtue of any judgment lien, bar acquisition of that exemption by the Debtor.[37] Because of the differences in the interests involved and in the their relationship to enactment of the Code, the issues raised in United States v Security Industrial Bank are not implicated in this case and such issues should not serve as a basis for upholding the decision below.

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36. See note 20, above.

37. The homestead character of a piece of property ...arises and attaches from the mere existence of certain facts in combination in place and time. See Estate of W. J. Newman, 413 So 2d 140, 142 (Fla 5th DCA 1982).

CONCLUSION

The decision of the Court of Appeals must be reversed and judgment entered for the Debtor, DWIGHT H. OWEN, avoiding the judgment lien.

Respectfully submitted

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